Supreme Court, U.S.
FILED

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No. 02 - 49 JUL - 5 2002

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In The Supreme Court of the United States

JONATHAN LEWIN,

Petitioner,

v.

WILLIAM J. COOKE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jonathan Lewin
622 Raleigh Avenue, #3
Norfolk, Virginia 23507-2034
(757) 625-6732

Pro Se Petitioner
(However, see p. 30)

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTIONS PRESENTED

1. When an appellant asserts that the circuit court's unpublished opinion in his case disobeys this Court's controlling precedent, and that publication would help to deter the disobedience, is there a due process right to require publication?

2. Whether a Fed. R. Civ. P. 54(d)(2)(B) motion must be filed within 14 days of the specified judgment for which it seeks attorney fees, i.e., whether a decision disposing of the merits of a case is "final" for that Rule.

3. Whether the words of Fed. R. Civ. P. 11 have their plain meaning.

4. Whether Fed. R. Civ. P. 6(b) allows no extension of time by a court after a deadline is passed, unless the party who would benefit from the extension asks for it by motion against which his adversary may argue.

5. Whether a prevailing defendant in a 42 U.S.C. Section 1983 or 1985 action may recover attorney fees against a plaintiff for a claim that is of first impression within the local circuit, and that has support from another circuit.

6. Whether the defense of qualified immunity may be first raised on appeal by a circuit court without notice to the plaintiff.

7. Whether the judiciary is prohibited from creating evidence that is not in the record.

8. Whether a plaintiff may be penalized for relying on uncontroverted precedent from the local circuit court.

9. Whether denials of due process by a trial judge, before and after a motion to recuse, justify recusal on appeal.

PARTIES AND CORPORATE DISCLOSURE

Petitioner

Petitioner is Jonathan Lewin, an individual citizen of the United States, residing in the Eastern District of Virginia. He has no corporate affiliations. Jonathan Lewin was the Plaintiff in the District Court, and the Appellant in the Fourth Circuit Court of Appeals.

Respondents

Respondents are William J. Cooke, Clinton H. Toewe, II, James E. Etheridge, Jr., Robert M. McCombs, James F. Lind, Thomas J. Manser, and the Medical College of Hampton Roads, a/k/a the Eastern Virginia Medical School of the Medical College of Hampton Roads, which is a public body and governmental, educational institution, created by the Virginia General Assembly, and is not a publicly-traded corporation. Petitioner is unaware of any corporate affiliations of these Respondents. These Respondents were the Defendants in the District Court and the Appellees before the Fourth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the Fourth Circuit Court of Appeals' opinion in this case, and to review that court's orders denying Petitioner's due process motions for the publication of the opinion.

OPINIONS AND ORDERS BELOW

In the Fourth Circuit

The Fourth Circuit per curiam panel amended its first, unpublished opinion in this case. The panel entered that first unpublished opinion on January 7, 2002. That opinion is reprinted in the Appendix ("App.") at 1a.

The panel entered its amended, second unpublished opinion on March 8, 2002. That amended, second unpublished opinion is reprinted at App. 23a.

By order entered March 8, 2002 [App. 20a], the Fourth Circuit denied Petitioner's timely petition [App. 135a, 159a], for en banc rehearing of the January 7 opinion, and denied Petitioner's motion [App. 163a] for publication of that opinion.

By order entered April 5, 2002 [App. 43a], the Fourth Circuit denied Petitioner's timely petition [App. 186a], for en banc rehearing of the amended, March 8, 2002 opinion.

By order entered April 11, 2002 [App. 46a], the Fourth Circuit denied Petitioner's timely motion [App. 208a], for publication of the amended March 8 opinion.

In the District Court

The district court decided the merits of this case and imposed on Petitioner Fed. R. Civ. P. 11 sanctions by opinion entered April 28, 2000, reported as Lewin v. Cooke, 95 F. Supp. 2d 513 (E. D. Va. 2000) [App. 49a], and by judgment entered May 1, 2000 [App. 74a].

The district court quantified Fed. R. Civ. P. 11 monetary sanctions as $5000.00 payable to the court, and denied reconsideration by opinion entered June 27, 2000 [App. 75a].

The district court denied Petitioner's motion for reconsideration of the quantity of sanctions by opinion entered July 10, 2000 [App. 90a].

The district court denied Petitioner's motion to recuse the trial judge by opinion entered January 5, 2001 [App. 92a].

The district court granted the Respondents' ["Defendants'"] July 11, 2000 Fed. R. Civ. P. 54(d)(2)(B) motion for attorney fees attributable to the May 1, 2000 Judgment, which the court assessed as $38,482.73, by opinion entered January 8, 2001 [App. 100a] and by judgment entered February 6, 2001 [App. 121a].

JURISDICTION

On March 8, 2002, the Fourth Circuit entered its amended, unpublished opinion, and by order of April 5, 2002 denied a petition for en banc rehearing of that opinion, and by order of April 11, 2002 denied a motion for publication of that opinion.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

PROVISIONS INVOLVED

For brevity, pertinent parts of the following provisions are set forth in the Appendix: Fifth and Fourteenth Amendments to the United States Constitution [App. 122a], the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. Section 1232g [App. 123a], 28 U.S.C. Section 455 [App. 125a], 42 U.S.C. Section 1983 [App. 126a], 42 U.S.C. Section 1985 [App. 127a], Fed. R. Civ. P. 6(b) [App. 129a], Fed. R. Civ. P. 11 [App. 130a], Fed. R. Civ. P. 54(d)(2)(B) [App. 133a], 4th Cir. Local Rule 36(c) [App. 134a].

STATEMENT OF THE CASE

The present case was filed in state court and removed by the Defendants to the Eastern District of Virginia, under 28 U.S.C. Sections 1331, 1441(a), (b) and 1443. Before this case began there had been an earlier case between the same parties before the same trial judge, the Honorable Rebecca Beach Smith.

The earlier case, and the present case, involved different provisions of the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. Section 1232g. None of the questions presented in this Petition depend upon whether Petitioner would still have a FERPA claim today. See Gonzaga Univ. v. Doe, 536 U.S._(2002) (available at http://www.supremecourtus.gov under "opinions.")

The crucial facts for this Petition are that: (1) the Fourth Circuit affirmed sanctions on grounds that contradict this Court's controlling precedents, and (2) disobedience to controlling precedents went hand in glove with concealment of disobedience through unpublished, nonprecedential opinions.

The Fourth Circuit's per curiam panel issued two unpublished opinions, the second opinion on March 8, 2002, replacing the first of January 7, 2002. The first opinion had based its holding, in part, upon a misquotation of FERPA's language. The second opinion corrected the misquote, but kept the same result as the first by relying on a misconstruction of the record. More disturbingly, the second opinion left conflicts with this Court's controlling precedents unresolved.

FERPA's subsection (a)(1)(A) grants students access to their education records. After Petitioner's first federal filing of an earlier case before Judge Smith, the Defendants withheld--beyond the forty-five days allowed by FERPA– two documents: a so-called "Master" document which was the prototype of a multiple-choice exam administered only to the Petitioner, and a tape recording of a meeting where Defendants decided

Petitioner's fate. Petitioner's controversy with these Defendants began when Defendant Cooke refused to look at proof that Petitioner had passed the multiple-choice exam. Cooke informed Petitioner that any proof was a "pissing contest." That contest over the exam has been left by the wayside. A much larger contest is at issue now. The Fourth Circuit affirmed Rule 11 sanctions of $5,000.00 and Rule 54 attorney fees of $38,482.73 against Petitioner on these grounds:

Regarding the "Master" document, the Fourth Circuit's first reason for sanctions was a guess that Petitioner's name might not be on the "Master" document. That supposition draws no support from the record on appeal: in fact, for support the per curiam panel relied upon another, wholly imaginary document, a letter that the panel imagined, which does not exist. The Fourth Circuit's second reason for sanctions was that Petitioner did not amend his earlier lawsuit to include the new claim. However, this second reason contradicts Fourth Circuit precedent that new claims acquired after a lawsuit has been filed should not be barred from being separately litigated.

Regarding the Defendants' withholding of the tape recording, the Fourth Circuit's first reason for sanctions is that circuits were split on whether nominal damages might be had for such a claim, which was of first impression in the Fourth Circuit. The panel's second reason is qualified immunity. The Defendants never asked for qualified immunity – neither in the district court, nor on appeal. The Fourth Circuit's unpublished decision invoked qualified immunity without giving Petitioner any notice or opportunity to argue against that defense.

In the district court, the Defendants had neglected the requirements for Rule 11 sanctions. Rule 11(c)(1)(A) requires a separate motion for sanctions. The Defendants never made that separate Rule 11 motion. Judge Smith never entered a show cause order required by Rule 11(c)(1)(B). Nonetheless, she made Rule 11 sanctions of $5,000.00 payable to her court.

Judge Smith's May 1, 2000 Judgment disposed of the merits of the case. The Defendants waited until July 11, 2000 to file their Rule 54(d)(2)(B) motion for fees attributable to that May 1 Judgment. They delayed well past the fourteen-days-from-the-specified-judgment requirement of Rule 54(d)(2)(B). The Defendants never made a Fed. R. Civ. P. 6(b) motion for extension of time in which to file their motion for fees. Judge Smith granted an extension after the deadline was past, without any 6(b) motion. She awarded $38,482.73 in attorney fees. Significantly, it was after Judge Smith denied Petitioner's motion to recuse her that she extended the Defendants' missed deadline without the necessary formalities.

Despite the non-observance of these procedural formalities, which are required by controlling precedents of this Court, the Fourth Circuit affirmed the penalties imposed by Judge Smith.

The only hearing before Judge Smith in this case took place on March 14, 2000. By that time, Petitioner had only filed arguments opposing the removal of this case from state court. Before Judge Smith had seen or heard any briefs from Petitioner on the merits of this case, at the start of the March 14 hearing, she said that if the Petitioner had been treated unfairly, he should reconcile himself to that.

In her April 28, 2000 opinion, Judge Smith justified sanctions in part by attributing to Petitioner a frivolous claim under 42 U.S.C. Section 1985(3). But, before the April 28 decision, Petitioner specifically denied bringing any claim under 1985(3). He called attention to the absence of such a claim twice again after the April 28 decision, in a motion for reconsideration, and in a motion to recuse. Judge Smith denied both motions without commenting on the contradiction. The Fourth Circuit affirmed without addressing the appearance that Judge Smith punished Petitioner for a claim he did not make.

REASONS FOR GRANTING THE WRIT

I. When an appellant asserts that the circuit court's unpublished opinion in his case disobeys this Court's controlling precedent, and that publication could help to deter the disobedience, there is a due process right to publication.

This Petition concerns the ability of the United States Supreme Court to deter disobedience by inferior courts despite the much heralded "crisis of volume"[1] in which the overwhelming number of petitioners seeking Supreme Court review makes it appear that many cases of disobedience by inferior courts must of necessity receive no review at all.

Repeatedly this Court has found it necessary to remind the circuits that Supreme Court precedent must be obeyed.[2]

The disobedience of the Fourth Circuit is at issue in this Petition. This Court explicitly rebuked the Fourth Circuit for disobedience in Hutto v. Davis.[3]

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[1]The Federal Courts Study Committee declared that the "appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." Report of the Federal Courts Study Committee 110 (1990).

[2]"[I]t is this Court's prerogative alone to overrule one of its precedents." State Oil v. Kahn, 522 U.S. 3, 20 (1997); See Agostini v. Felton, 521 U.S. 203, 237 (1997); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 486 (1989).

[3]454 U.S. 370, 374-75 (1982): "[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress.... [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts ..."

More recently, the Fourth Circuit has again challenged this Court.[4]

Disobedience is often subtle. It is seldom bluntly announced as disobedience by an offending inferior court. "'...[All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 500 (1993) (O'Conner, J., dissenting) (citation omitted).[5]

Commentators have warned for many years that the crisis of volume and the associated use of nonpublished opinions lessen the likelihood of correction by this Court, and therefore lessen inhibitions that might otherwise deter disobedience.[6] This Court

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[4]In United States v. Dickerson, 166 F.3d 667, 691-92 (4th Cir. 1999) the Fourth Circuit held that this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), was not binding in federal courts because of a statute enacted by Congress shortly after Miranda was decided. The Fourth Circuit would have revised the effect of the more than thirty years during which Miranda had been acknowledged and reaffirmed as controlling precedent. This Court reversed. Dickerson v. United States, 530 U.S. 428 (2000).

[5]Professor Charles Fried of Harvard Law School defines disobedient subtlety as "impudence": "The impudent judge does not admit his alienation from the system he claims to serve. He admits that his moral title to exercise authority over his fellow citizens derives from the authority of that system--and yet he will not act according to its terms." Fried, Impudence, 1992 Supreme Court Review 156, 192.

[6]See Reynolds & Richman, The Non-Precedential Precedent--Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Columbia L. Rev. 1167, 1203 (1978) The "felt need" of Circuit Courts to correct error in unpublished opinions is less because "[i]t is not often that the [Supreme] Court will make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly ..." i.e., a case that may have been disobedient, but which is merely another example of unpublished law that is not binding precedent. See also id at 1201.

has warned the Circuit Courts not to suppose that unpublished decisions automatically escape review.

In Commissioner v. McCoy, 484 U.S. 3 (1987), this Court reversed an unpublished opinion from the Sixth Circuit. This Court stated: "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." Id at 7.

But one warning, issued in 1987, was not enough.

The Fourth Circuit's choice not to publish a decision in 1993 drew a rebuke from this Court: "We deem it remarkable and unusual that although the Court of Appeals affirmed a

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Cf. Justice Steven's scorn for "secret law" in County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985). Justice Stevens, dissenting from summary reversal, criticized the Ninth Circuit's choice not to publish its opinion: "That decision not to publish the opinion or permit it to be cited--like the decision to promulgate a rule spawning a body of secret law--was plainly wrong."

Disobedient secret law is not binding on future cases because unpublished opinions are not binding. See e.g., the Fourth Circuit's captions on the unpublished opinions in this case: "Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)." App. 3a & 28a. But if, because of unpublished cases' non-binding character, it appears that unpublished disobedience is not to be corrected, then it becomes more difficult to deter inferior courts from resorting to it at will.

See also skepticism as to the legitimacy of unpublished opinions in Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1374 (1995); Andreani, Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System, 12 Pac. L.J. 727, 736 (1981); Arnolds & Kamp, Civil Procedure: A Review of the Published Opinions of the United States Court of Appeals for the Seventh Circuit for the 1981-82 Term, 59 Chi. Kent. L. Rev. 475, 518 (1983); R. Posner, The Federal Courts: Crisis and Reform 123 (1985) (repeated in the 1996 edition, The Federal Courts: Challenge and Reform, at 165).

judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion." United States v. Edge Broadcasting Co., 509 U.S. 418, 425 n.3 (1993).

The Fourth Circuit produced another noteworthy abuse of nonpublication which this Court chose to correct. Commentators listing such abuses tell the cautionary tale of Proctor v. Warden:

> In reviewing an unpublished decision of the Fourth Circuit, the Supreme Court found that the appellate court had filed an order that, "clearly ha[d] nothing whatsoever to do with the petitioner's case." Proctor v. Warden, 435 U.S. 559, 560 (1978). the Fourth Circuit order had "disposed" of the case by mistaking plaintiff's requested remedy, the court in which it was filed, and apparently, the very name of the case.[7]

After the Fourth Circuit made its initial mistake, Mr. Proctor petitioned for rehearing en banc, but the Fourth Circuit denied rehearing. Blatant as the appearance of injustice had been in that case, the Fourth Circuit would not correct it until compelled by this Court to do so.[8]

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[7]Reynolds & Richman, supra note 5 at 1202 n. 173. For other incongruities in the Fourth Circuit's treatment of particular unpublished appeals, see id at 1193, n. 135 and at 1197 n. 153.

[8]For more recent examples of how Fourth Circuit denials of rehearings failed to anticipate reversals from this Court, see George, The Dynamics and Determinants of the Decision to Grant En Banc Review, 74 Wash. L. Rev. 213, 215-6 & nn. 8-11 (1999).

The Fourth Circuit leads the Circuits in its use of unpublished opinions.[9] This high rate does not correlate with a greater workload.[10]

The Eighth and Ninth Circuits have recently argued whether unpublished decisions should be counted as precedents.

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) vacated on other grounds 235 F.3d 1054 (2000), attracted much attention because it held on constitutional grounds that unpublished decisions do count as precedents.

Groups on the left and right of the political spectrum were quick to interpret the issue as one of judicial accountability.[11]

Anastosoff concluded that the constitutional limits of judicial power, separate from legislative power, require Article III courts to give their unpublished opinions precedential effect.

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[9]And in that leading role, 91.5% of the Fourth Circuit's opinions were unpublished in 2001, according to Judicial Business of the United States Courts: 2001 Annual Report of the Director, 40, tbl. S-3 (available at http://www.uscourts.gov/judbus2001/ under "contents.html").

[10]"[T]he Fourth Circuit's publication rate ... is very low given its also low workload rank ..." Robel, The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399, 403 (2002) ["Robel"] (referring to figures from Comm'n on Structural Alternatives for the Fed. Cts. of Appeals, Working Papers 101 (1998)).

[11]Pambianco, Taking Judicial Notice, National Review Online, at http://www.nationalreview.com/comment/commentprint 101000a.html (Oct. 10, 2000) (from the conservative side of the political spectrum, the Washington Legal Foundation's chief policy counsel praised Anastasoff for having "done much to restore accountability to one branch of the federal government."); Mauro, Stealth Decisions Under Fire, Legal Times, Sept. 4, 2000, at 6, cols. 1, 3 (from the liberal side of the political spectrum, the executive director of Trial lawyers for Public Justice praised Anastasoff for opposing a "'two-tiered body of law' where judges are unaccountable and 'there is the rampant possibility of abuse.'")

Anastosoff quoted Justice Joseph Story to the effect that the refusal to treat like cases alike "would have been deemed [by the Framers] an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all just checks upon judicial authority."[12]

The Ninth Circuit opposed Anastasoff in Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001), which noted that "Anastasoff, while vacated [on other grounds], continues to have persuasive effect." Id. at 1159.

Hart allowed that disobedience to controlling precedent might be "cause for alarm." Id. at 1160. But Hart also noted that disobedience--by definition--is not officially permitted. Id. at 1160 n.3, 1170-71. Therefore--on the premise that only what is officially permitted is actually done--Hart concluded that disobedience is not fostered by nonpublication.

Nonetheless, the Ninth Circuit made this interesting concession which goes to the difficulty on appeal of correcting a disobedient decision: "[E]n banc procedures are seldom used merely to correct the errors of individual panels." Id. at 1172 n. 29. "Appellate courts often tolerate errors in their case law because the rigors of the en banc process make it impossible to correct all errors." Id. at 1175.

Therefore, Hart concludes that the "binding authority" of a circuit's own controlling precedent would not be "an unalloyed good" because it would complicate a circuit court's tolerance of error. Id. In Hart's formulation, panels err, but parties on appeal should have no greater recourse, neither to deter error beforehand, nor to have a realistic hope of persuading a court en banc to correct error afterwards. And indeed, what incentive would a circuit court have to take on the burden of acting en banc when the effect of an unpublished error is not binding?

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[12]223 F.3d at 904 (quoting J. Story, Commentaries on the Constitution of the United States, sections 377-78 (1833)).

Only if the error were published would there be an incentive to correct it.

Hart's priorities contrast sharply with the statement of this Court in Stanley v. Illinois, 405 U.S. 645, 656 (1972):

> ...the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, that mediocre ones.[13]

One judge of the Fourth Circuit has already candidly confided that rights may routinely disappear through the judicial strategy of nonpublication. Judge Murnaghan refers to the "repeated" disappearance of rights, rights which, nonetheless, may be "clearly established":

> It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, see Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established.

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[13] Accord, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) ("[A]n underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.")

Wilson v. Layne, 141 F.3d 111, 124 n.6 (4th Cir. 1998) (Murnaghan, J., dissenting) (emphasis added).

A right may have been clearly established. And how else could it have been clearly established except by the controlling precedent of published decisions? But the reality for people who must rely on the appellate process is that a right can be disestablished at any time by nonpublication of a decision to deny the right. Through nonpublication there is no security in any kind of controlling precedent, and, as Hart too-candidly confides, there is little incentive for a circuit court to correct an error afterwards with en banc review--especially if it is a nonbinding, unpublished error.

Through the potential for abuse inherent in nonpublication, the crisis of volume leads to a crisis of confidence as the growing circle of criticism expands beyond the academy into politics.[14]

This Court has found it necessary to remind the circuits that this Court's precedent must be obeyed. Public perceptions of the legitimacy of the courts are also of special concern to this Court: "The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nations' law means and to declare what it demands." Planned Parenthood v Casey, 505 U.S. 833, 865 (1992).

The two concerns are related: inferior federal courts that defy controlling precedent compromise their own appearance of legitimacy, and lessen the public's regard for the judicial process.

The problem is compounded by the appearance that the Courts of Appeals are the courts of last resort. Hart supplies figures suggesting that less than one percent of Petitions for Writs of Certiorari can be granted. 266 F.3d at 1177 & n.34.

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[14]Robel, supra note 10 at 417, and supra, note 11.

Certainly the proportion of cases that can be granted Certiorari is small.

This Court would correct disobedience if it could, but this Court cannot be everywhere at once. An alternative proposed by one commentator[15] may have been reinforced by Hart.

As Hart implied, the publication of a disobedient opinion interferes with a circuit court's ability to tolerate the error. A disobedient opinion, published as precedent, could prove to be a more public embarrassment, threaten to complicate future cases, and give the court incentive to "bite the bullet" and rehear the disobedient opinion en banc. Better yet, the probability that a not-yet-drafted opinion, if it were to be disobedient, might become public and precedential, could deter the writing of such a disobedient opinion altogether.

This is not to say that all unpublished opinions need to be published. The solution is much narrower.[16] Of all the unpublished opinions, only a small subset--hopefully a very small

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[15]See Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A.J. 1224, 1227 (1975) (proposing a right to require publication for the sake of its "effective 'embarrassment potential'".)

[16]Narrowness may be a virtue, since petitioners have repeatedly sought constitutional relief of varying scope from various abuses of nonpublication.

Constitutional challenges on this topic began to reach this Court more than twenty years ago. See Note, Honda meets Anastasoff: The Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions 42 Boston Col. L. Rev. 695, 713 (2001) (describing the Petitioners' arguments in Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit, 429 U.S. 917 (1976), and in Browder v. Director, 434 U.S. 257 (1978)).

Constitutional challenges have resumed more recently. Like Anastasoff, the other, more recent challenges would have a more sweeping effect than the relief sought in this Petition. See Petitions for Writs of Certiorari in Schmier v. Jennings, 522 U.S. 1149 (1998), Schmier v. Supreme Court of California, 531 U.S. 958 (2000), Alcan Aluminum Corp. v. Prudential Assurance Co. Ltd. (No. 01-1594).

subset--namely the disobedient subset--should be published so it will be corrected--and repetition deterred--without intervention by this Court.

Who decides whether an opinion is disobedient? Ideally not someone who has an interest in preventing its publication, i.e., not its drafters. Rather, the party who stands to benefit from deterring disobedience is most likely to defend controlling precedent, and therefore should be able to say: "In the name of due process, I veto nonpublication."

This Petitioner twice petitioned the Fourth Circuit for rehearing en banc [App. 135a & 186a], and in conjunction with each petition for rehearing, he made a separate motion asserting a due process right to require publication. App. 163a & 208a.

In reaction to the first petition for rehearing en banc, the per curiam panel that had drafted the January 7, 2002 unpublished opinion amended that opinion to correct its misquotation of a statute and its misreliance on that error. App. 23a. But the panel substituted another misreading--this time misconstruing the record--to maintain the same outcome for its March 8, 2002 amended opinion. App. 192a - 202a. Indeed, by amending the January 7 unpublished opinion, the panel as much as admitted that the January 7 version, which relied on a misquotation of a statute, had been unlawful.

The Fourth Circuit's order of April 11, 2002 denied this Petitioner's motions for publication, and therefore denied his assertion of a due process right to have the unpublished opinion count as precedent--before or after its amendment. App. 48a.

"To the suspicious, unpublished will often suggest secret and corrupt.[17] The harm from such a perception is great.[18] The cost of protecting against that harm, in an instance such as this, is quite modest.

This Court has required judicial accommodation--even disqualification of a judge from presiding over a case--to avoid that harm:

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. [Continuing in note "12":] As we held in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813,106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), this concern has constitutional dimensions. In that case we wrote: "[...] The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" Id., at 825, 106 S.Ct. at 1587 (citations omitted).
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> Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 & n.12 (1988).

Therefore, due process would even require recusal of a judge if anything less "is unlikely significantly to quell the concerns of the skeptic." Id., 486 U.S. at 865 n.12.

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[17]Render, On Unpublished Opinions 73 Kentucky L.J. 145, 158 (1984-85).

[18]See Bush v. Gore, 531 U.S. 98 (2000) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law." Id. at 128, Stevens, J., dissenting; "[T]he public's confidence ... is a public treasure. ... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself." Id. at 157-58, Breyer, J., dissenting.)

If recusal can be a preventive measure, then surely publication at an appellant's request is a far less burdensome preventive measure aimed at the same goal of sustaining public confidence.

The alternative--the appearance of a resolve by the circuit courts to hide mistakes or abuses behind nonpublication, regardless of protests from appellants--promotes the popular perception published in Forbes Magazine;

> [A]n unpublished decision ... means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings. ..."[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit ... "They can't justify what they're going to do, so they don't publish it," says [Russell] Lukes [Esq.], who works out of Washington, D.C.[19]

Publication upon an appellant's request seems like a modest and minimal safeguard, doing no harm if the appellant's fears are misguided. If the inclusion of a few extra pages in a Federal Reporter can help to guarantee the integrity of the appellate process and sustain public confidence in that process against the suspicion of possible abuse, then the minimal cost should be well worth it.

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[19]McMenamin, Justice in the Dark: Federal Appeals Judges Say They Are So Overworked that They Have To Dispense Quickie Jurisprudence--Meaning, No Accountability, Forbes Magazine, October 30, 2000, at 72 col. 3, 74 col. 1-2 (Also available at http://www.nonpublication.com under "Press Clippings". As suggested by the name of this website, the movement for reform of nonpublication now sponsors an online clearinghouse on the topic.)

The New York Times, in a front page article, even quotes the Honorable Richard A. Posner, Chief Judge of the Seventh Circuit, describing unpublished opinions as "sort of a formula for irresponsibility." Glaberson, Caseload Forcing Two-Level System for U.S. Appeals, N.Y. Times, March 14, 1999, at 1, 26 col. 3.

By asserting such a deterrent due process right, parties should be able to reinforce the sovereignty of this Court when that sovereignty is undermined by disobedience cloaked in abuses of nonpublication.

It might be argued that as of the time of this Petition to this Court, publication of the Fourth Circuit's unpublished opinion would come too late to have a deterrent effect in this case. But then no petitioner could ever bring the question of such a due process right to this Court. This Court recognizes an exception to mootness, "a classic justification of nonmootness [where a harm would be] 'capable of repetition, yet evading review.'" Roe v. Wade, 410 U.S. 113, 125 (1973).

II. A decision disposing of the merits of a case is "final" for the purpose of Fed. R. Civ. P. 54(d)(2)(B), and subject to that Rule's 14-day timeliness requirement.

In Budinich v. Becton Dickinson and Co., 486 U.S. 196, 199-200 (1988), this Court considered a trial court's decision disposing of the merits of a case. The decision, disposing of the merits, had also imposed unspecified monetary sanctions of an amount to be quantified later. This Court held that a later decision quantifying sanctions was not the "final" decision for purposes of an appeal. A "final" decision is the decision that disposes of the merits of a case.[20]

In this case, the district court entered the judgment deciding the merits on May 1, 2000. Therefore, according to Budinich, that May 1 Judgment was "final."

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[20]Even before Budinich made the rule quite plain and definitive, the Fourth Circuit had observed: "a merits judgment is not made less final or appealable by an outstanding fee question." Bernstein by Bernstein v. Menard, 728 F.2d 252, 253 (4th Cir. 1984). Even if this Court had not decided Budinich, Bernstein would have been binding on the per curiam panel that decided this case, since in the Fourth Circuit, a later panel is bound by a previous published Fourth Circuit decision. Etheridge v. Norfolk & Western Ry. Co., 9 F.3d 1087, 1090 (4th Cir. 1993).

A later, June 27, 2000 order quantified sanctions against the Petitioner. The Fourth Circuit supposed that the June 27 order was the "final" order. But that contradicts this Court's holding in Budinich.

The time had begun to be counted from May 1, 2000 for the Petitioner to appeal the May 1 Judgment. Using Fed. R. Civ. P. 11, that Judgment had imposed on the Petitioner an immediate injunctive sanction, and monetary sanctions of an amount to be quantified later. Had the Petitioner not timely appealed that Judgment to the Fourth Circuit, his appeal would have been barred. Since the May 1 Judgment had that kind of finality for the Petitioner, it had to have finality also for the Defendants.

III. The words of Fed. R. Civ. P. 11 have their plain meaning.

The Fourth Circuit erred to rule as follows:

> In the district court's May 1, 2000 order and accompanying opinion, the court requested an estimation of the defendants' attorneys' fees ... The May 1, 2000 order therefore preserved the issue of the defendants' attorneys' fees until the final order of June 27, 2000, which quantified sanctions, and the defendants had good reason to believe that the district court would treat attorneys' fees as part of Rule 11 sanctions. ... Under these circumstances it was reasonable for the defendants to wait ... [App. 14a & 40a.]

The Fourth Circuit's conclusion here denies Budinich by defining the June 27 order as the "final order."[21] Worse, the

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[21]"Final" here cannot be an accident of semantics. The June 27, 2000 order was followed by subsequent orders of July 10, 2000, and of January 5 and 8, 2001, and a Judgment of February 6, 2001, all of which were timely appealed and consolidated into Petitioner's one appeal before the Fourth Circuit. When the Fourth Circuit held that the June 27, 2000 order was the "final" one, it could not have been holding merely that that order was chronologically "last" in the sequence because it was not last.

Fourth Circuit disregards another controlling precedent of this Court: Pavelic & LeFlore v. Marvel Entertainment, 439 U.S. 120, 123 (1989). According to this Court in Pavelic, the words of Rule 11 have their plain meaning.

According to the plain meaning of Rule 11, and directly contrary to the words quoted here from the Fourth Circuit opinions, the Defendants could not have "had good reason to believe that the district court would treat attorneys' fees as part of Rule 11 Sanctions."

If the district court had awarded attorney fees under Rule 11, that award would have been contrary to Rule 11. Rule 11(c)(1)(A) required the Defendants to make a separate motion for sanctions. The Defendants never made that separate Rule 11 motion. They made only a Rule 54 motion, very belatedly, on July 11, 2000. They were responsible for knowing Rule 11, and they could not have reasonably believed that its requirements could be avoided.

The Fourth Circuit erred by contradicting Pavelic and the cases from the Second and Seventh Circuits which have specifically rejected requests for sanctions that did not comply with the separate motion requirement of Rule 11(c)(1)(A).[22]

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[22]L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 89-90 (2d Cir. 1998); Johnson v. Waddell & Reed, Inc., 74 F.3d 147, 150-51 (7th Cir. 1996).

See also Tate v. Lau, 865 F. Supp. 681, 691 (D.Nev. 1994); Cortez v. CMG Worldwide Inc., 962 F. Supp. 308, 313 (N.D.N.Y. 1997); Fat T, Inc. v. Aloha Tower Associates Piers 7, 8, & 9,172 F.R.D. 411, 415 (D.Hawai'i 1996); Hoydal v. Prime Opportunities, Inc., 856 F. Supp. 327, 329 (E.D. Mich. 1994); Lenoir v. Tannehill, 660 F. Supp. 42, 44 (S.D. Miss. 1986).

At the March 14, 2000 hearing, and again in a March 21, 2000 brief, the Petitioner's counsel put the Defendants on notice that they had not made the required motion.[23]

IV. Fed. R. Civ. P. 6(b) allows no extension of time by a court after a deadline is passed unless the party who would benefit from the extension asks for it by motion against which his adversary may argue.

On July 11, 2000, the Defendants filed a Fed. R. Civ. P. 54(d)(2)(B) motion for fees attributable to the May 1 Judgment, well past the fourteen-days-from-the-specified-judgment requirement of Rule 54(d)(2)(B). They did this as an afterthought because they had neglected to follow the proper procedures for Rule 11 sanctions.

Perhaps the Defendants could have argued--though with little expectation of success--that for their Rule 54 motion they should have been allowed an extension of time under Fed. R. Civ. P. 6(b). Then the Petitioner would have been able to argue against their motion for an extension of time. But the Defendants never moved for any extension. This Court's holding in Lujan v. National Wildlife Federation, 497 U.S. 871, 895-96 (1990) holds that without a motion for an extension, no court may give the Defendants an extension in retrospect, after the deadline has passed. Even "good reason," cannot result in an extension of time after the deadline for filing is past, unless that "good reason" is presented as a motion which both sides may argue.

The Fourth Circuit errs by departing from Budinich, Pavelic, and Lujan, to support a Rule 54 penalty of $38,482.73.

V. A prevailing defendant in a 42 U.S.C. Section 1983 or 1985 action may not recover attorney fees against a plaintiff for a claim that is of first impression within the local circuit, and that has support from another circuit.

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[23]See Fourth Circuit Joint Appendix ("J.A.") at 1047 & 232.

The Fourth Circuit disobeyed this Court's holdings in other ways on the matter of attorney fees. The Fourth Circuit paraphrased this Court as follows: "A prevailing defendant may recover attorneys' fees in [Section] 1983 and [Section] 1985 actions only when the plaintiff's claims were 'frivolous, unreasonable, or without foundation.' Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)." App. 15a & 40a.

The Fourth Circuit re-defined "frivolous, unreasonable, or without foundation" contrary to this Court's plain meaning.

The Fourth Circuit proposed two alternate grounds for ruling frivolous a claim that had been based on the Defendants' withholding of a tape recording. The claim was that this withholding violated FERPA's subsection (a)(1)(A) and 42 U.S.C. Section 1983.

The Fourth Circuit observed that other circuits were split on whether there could be nominal damages for that claim, a question which for the Fourth Circuit was one of first impression. App. 10a & 35a. The Fourth Circuit offered this as the first ground for negating Petitioner's claim.

Yet, when there is no contrary authority within a circuit, a claim with support in another circuit is not "frivolous, unreasonable, or without foundation" by definition.

Therefore, this could not have been a basis for penalties under Rule 11 or Rule 54.

VI. The defense of qualified immunity should not be first raised on appeal by a circuit court without notice to the plaintiff.

The Fourth Circuit then suggested that the basis for penalties was the alternate ground of "qualified immunity." App. 10a & 36a.

That result directly contradicted this Court's controlling precedents. A fundamental right of due process is the opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545,

552 (1965). The Petitioner could have argued that the Defendants were not entitled to qualified immunity. He could have argued this in the district court. He could have argued this on appeal. But because the Defendants never raised this affirmative defense–not in the district court, and not on appeal--and no court even asked about it, he had no reason to argue against an affirmative defense that had never been raised. When the Fourth Circuit acted by surprise on its own initiative to supply the Defendants with a defense they had never asked for, the Fourth Circuit denied the Petitioner the fundamental due process opportunity to be heard. This was all the more grievous because this Court specifically holds that a plaintiff is not to be burdened by a need to anticipate qualified immunity:

> [T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action ... the burden of pleading it rests with the defendant.... We see no basis for imposing on the plaintiff an obligation to anticipate such a defense ... To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.
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> Gomez v. Toledo, 446 U.S. 635, 640-41 (1980).

Indeed, even without this Court's controlling precedents, the Fourth Circuit should have been bound by its own precedent that "qualified immunity cannot be asserted for the first time on appeal." Sales v. Grant, 224 F.3d 293, 296 (4th Cir. 2000).

Accordingly, the claim should not have been penalized under Rule 11 or Rule 54.

VII. The judiciary is prohibited from creating evidence that is not in the record.

The Petitioner also brought another claim, and the Fourth Circuit proposed alternate grounds for dismissal and penalties against it. But each ground denies the rulings of this Court.

Before the present case began, there had been an earlier case between the same parties in the district court. While that case was pending, the Defendants withheld a document from the Petitioner for many months beyond the time limit allowed by FERPA's subsection (a)(1)(A). That withholding, a violation of FERPA, became a separate claim in this case.

The Fourth Circuit justified penalties and dismissal of that claim on alternate grounds:

(1) the document was not covered by FERPA because--supposedly--Petitioner's name was not on the document, App. 7a & 33a, and

(2) Petitioner did not amend the earlier lawsuit to include the new claim. App. 8a & 33a.

This Court holds that "'on summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" Adickes v. S.H. Kress and Company, 398 U.S. 144, 158-59 (1970) (citation omitted). It logically follows that at no point, neither on summary judgment nor or on appeal, is it the function of a judge to manufacture evidence.

But the Fourth Circuit did just that. The circuit court manufactured documents that are lacking from the record on appeal.

The Fourth Circuit imagined a document that does not exist: a letter from the United States Department of Education ("DoE") supposedly referring to a so-called "Master Challenge Exam."

The panel imagined another document which does exist but which is not to be found in the record: the "Master Challenge Exam" itself [referred to in Petitioner's pleadings as the "Master" document].

The Fourth Circuit used these absent or nonexistent documents to strike down the petitioner's claim:

> The DOE [U.S. Department of Education] has indicated in a letter to Lewin that the Master Challenge Exam, which is a general answer key, is not directly related to Lewin and does not constitute part of his education record. The Master Challenge Exam does not contain Lewin's name, nor does it contain any record of his educational performance. ... we agree with DOE that it is not itself one of Lewin's education records. [App. 7a & 33a.]

There is no such letter. The DoE never sent any letter to the Petitioner referring to the specific document in question (by whatever name it may be called, "Master Challenge Exam" or "'Master' document").

The Fourth Circuit, in the passage quoted above, also professes to have knowledge of the contents of the "Master" document. But this is impossible.

The record on appeal, and in the trial court, does not contain the complete "Master" document, or even its cover.

The panel cannot know whether the "Master" document has the Petitioner's name printed on it.

On the contrary, there was every reason for the panel to assume that his name would be on that document. According to his pleadings, only one exam existed that matched the "Master" document. App. 150a(n.1); J.A. 1065. It is not contested that that exam, personally identified to the Petitioner, was covered by FERPA. The "Master" document was the prototype of the unique exam which had been administered only to the Petitioner. The prototype showed the intended answer for each multiple-choice question. As long as the exam was directly related to the Petitioner, the "Master" document had to be directly related to him in equal measure. It simply could not be related to anyone or anything else. Given that direct relationship to an exam

known to bear his name, whether the "Master" document also bore his name should not matter. But if it did matter, then how could the Fourth Circuit deny that his name was there when the record is silent?[24]

VIII. A plaintiff may not be penalized for relying on uncontroverted precedent from the local circuit court.

The Fourth Circuit's alternate ground for penalties also denies the rulings of this Court.

Support from the Fourth Circuit showed that when new claims arise during the pendency of an action, a plaintiff is not barred from making those new claims the subject of a separate filing. The Fourth Circuit had quoted with approval Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist,. 750 F.2d 731, 739 (9th Cir. 1984), cert denied, 474 U.S. 919 (1985):

> "[T]he rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated."
>
> Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770, 774 n.3 (4th Cir. 1991) (emphasis added).

The Petitioner had conformed his conduct to what was the Fourth Circuit's then-current position until, unexpectedly, in the unpublished opinion that disposed of Petitioner's claims, that court changed its mind. App. 160a-62a, 225a-28a.

A sudden change of mind by a circuit court, a change for which there was no forewarning, does not supply a basis for

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[24]As noted in this Petition's Statement of the Case: for the purposes of this Petition, which challenges the disobedience of inferior courts to this Court's controlling precedents, it does not matter whether Petitioner would still have a FERPA claim today. See Gonzaga Univ., 536 U.S._____ (http://www.supremecourtus.gov). It is quite sufficient for this Petition that Petitioner was subjected to penalties in a way that conflicts with the precedents of this Court.

sanctions. To sanction a party for no better reason than that a circuit court "pulled the rug out from under his feet" would be contrary this Court's "American Rule."[25]

IX Denials of due process by a trial judge, before and after a motion to recuse, justify recusal on appeal.

In this case, the one and only hearing before Judge Smith occurred on March 14, 2000. By that time, Petitioner had only filed arguments opposing the removal of this case from state court. Before Judge Smith had seen or heard any of Petitioner's arguments on the merits of this case, at the start of the March 14 hearing, she announced that if the Petitioner had been treated unfairly, he should reconcile himself to that.

> THE COURT: ... I don't understand why he just can't get over it and move on with his life. I truly don't understand it. ... just at some point you have to move on with your life, and whether or not you think you were treated fairly or unfairly, life is not always fair, and you have to accept these things, and I don't understand–I just don't understand why Mr. Lewin can't. ...
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> 3/15/2000 Hearing Transcript, p. 29, Ins. 6-8, 18-22 (emphasis added.) [J.A. 1021].

This spontaneous expression suggested a mindset on the part of the judge all the more troubling because it preceded the hearing of any arguments or evidence from the Petitioner.

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[25]"In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975) (emphasis added, this Court identifying this as the "American Rule." Id.) The mere fact that a party is unsuccessful on its claims does not warrant a finding of bad faith. Runyon v. McCrary, 427 U.S. 160, 183-84 (1976). "[O]ne should not be penalized for merely defending or prosecuting a lawsuit." F.D. Rich Co. v. United States ex rel Industrial Lumber Co., 417 U.S. 116, 129 (1974).

In her April 28, 2000 opinion, Judge Smith justified sanctions in part by attributing to Petitioner a frivolous claim under 42 U.S.C. Section 1985(3). App. 68a. But, before the April 28 decision, Petitioner specifically denied bringing any claim under 1985(3). J.A. 247. He called attention to the absence of such a claim twice again after the April 28 decision, in a motion for reconsideration [J.A. 1332-33], and in a motion to recuse [J.A. 1515-18]. Judge Smith refused to respond to these disavowals. She denied both motions. App. 90a, 92a. The Fourth Circuit affirmed her denials of the motions without addressing the appearance that Judge Smith had punished Petitioner for a claim he did not make. App. 15a & 41a. But putting words into the mouth of a party, against his protests, to provide an excuse for punishing him creates an appearance very different from impartial justice.

Petitioner moved to recuse Judge Smith. J.A. 1480.

Because a motion to recuse might seem likely to offend the sentiments of a trial judge, it was all the more important that after such a motion, a decision about the Defendants' motion for fees should appear to be scrupulously impartial. The motion to recuse, indeed, proposed that a different judge should decide the Defendants' motion for fees. But Judge Smith denied the recusal motion on January 5, 2001. Three days later, on January 8, 2001, without a hearing, she granted the Defendants' fee motion. The liability for fees which she imposed under Fed. R. Civ. P. 54(d)(2)(B) was unconventional. She reached back in time in a manner not permitted by 54(d)(2)(B), to revive liability that had already expired under that rule's 14-days-from-the-specified-judgment time limit for filing a fee motion, the time limit which the Defendants had not observed. To support her decision, she made use of Rule 6(b) which she could not use because the Defendants had failed to file a 6(b) motion.

Judge Smith did this with no notice to the Petitioner that she was considering Rule 6(b). She allowed him no opportunity to show why, under Lujan, 497 U.S. at 895-96, Rule 6(b) could

not be applied. It appeared that Judge Smith had become impatient: formalities could be dispensed with. But the denial of such formalities directly contradicted Lujan, and laid the foundation for a compound denial of due process.

The appearance of retaliation compounded the problem.

Scrupulous regard for appearances is required both by due process and by a statutory authority for recusal, 28 U.S.C. Section 455, because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." Liljeberg, 486 U.S. at 864-65.

How a trial judge responds after a motion to recuse–and the appearance that response creates–is crucial because a motion to recuse will always appear to an observer to be the kind of motion that might offend the sentiments of a trial judge.

There is never a good time for a district judge to disobey this Court's holding in Lujan by skipping formalities. But when a district judge disobeys controlling precedent of this Court in a manner that creates the appearance of retaliation, to punish the party who moved to recuse her, that is the worst time of all.[26]

CONCLUSION

This case from the Fourth Circuit continues the unhappy tradition of inferior courts disobeying the controlling precedent of this Court. Therefore, this case should be every bit as troubling to the public and the Bar as cases from the same circuit: Proctor v. Warden, and Hutto v. Davis, in which the appearance of injustice or of frank disobedience prompted this Court's stern rebukes.

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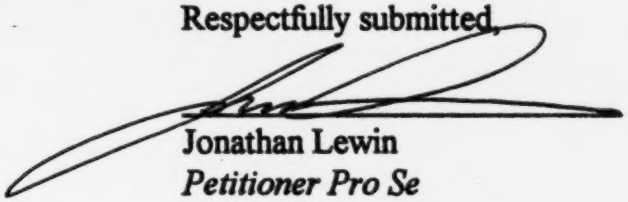
[26]Compare this Court's holding in Offutt v. United States, 348 U.S. 11, 14-15 (1954): "But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law....[T]he determination ... and the punishment properly to be meted out ... should have been made in the first instance by a judge not involved..."

But this case offers a possible solution for disobedience. A due process right to veto nonpublication raises the hope that disobedience can be deterred or corrected, even during the current "crisis of volume," without the need for greatly expanded intervention by this Court.

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



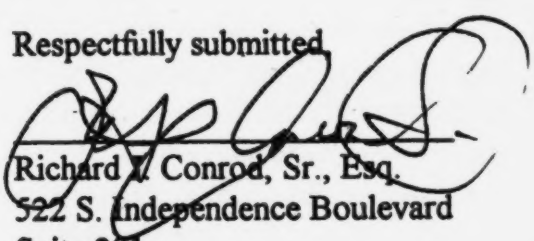
Jonathan Lewin
Petitioner Pro Se
622 Raleigh Avenue, #3
Norfolk, VA 23507-2034
Phone: (757) 625-6732

Statement of Richard J. Conrod, Sr., Esq., who represented Petitioner in the courts below:

Judge Smith sanctioned me on April 30, 2002, for attempting to recuse her from this case. Sanctions blocked my admission to the Bar of this Court, but the Admissions Officer, Perry Thompson, informs me that if this *pro se* Petition is granted, I may apply to represent Petitioner *pro hac vice*.

I state my intention to do so.

Respectfully submitted,



Richard J. Conrod, Sr., Esq.
522 S. Independence Boulevard
Suite 201
Virginia Beach, Virginia 23452
Phone: (757) 456-0883
FAX: (757) 456-2336

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 00-1732

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 00-1943

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 01-1165

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 01-1335

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge.
(CA-99-2117-2)

Argued: October 29, 2001

Decided: January 7, 2002

Before WILKINS, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Johan Conrod, Sr., RICHARD J. CONROD, SR., P.C., Virginia Beach, Virginia, for Appellant. Jonathan Barkasy Sprague, POST & SCHELL, P.C., Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** A.James Johnston, POST & SCHELL, P.C., Philadelphia, Pennsylvania; David K. Sutelan, MAYS & VALENTINE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

OPINION

PER CURIAM:

Jonathan Lewin has sued the Eastern Virginia Medical School of the Medical College of Hampton Roads (EVMS) and various of EVMS's employees, alleging that the defendants prevailed in Lewin's previous federal lawsuit by improperly and illegally withholding crucial information. In the prior federal case Lewin invoked the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (a) (2), in seeking to challenge the score he received on a pharmacology exam at EVMS. Lewin alleged that two of his answers, which were wrong according to the answer key, were in fact correct. Lewin essentially sought to have a federal court determine, for example, whether chlorothiazide or furosemide is the most appropriate treatment for congestive heart failure. Not surprisingly, the district court dismissed his case, holding that FERPA § 1232g (a) (2) only permits actions to correct ministerial or technical inaccuracies in educational records, not to challenge the substantive scientific accuracy of a pharmacology examination. *See Lewin v. Medical College of Hampton Roads*, 931 F. Supp. 443 (E.D. Va. 1996) (*Lewin I*).

In this case Lewin alleges that the defendants denied him access to crucial educational records so as to prevent him from prevailing in his previous federal lawsuit, in violation of FERPA § 1232g (a) (1) (A), 42 U.S.C. § 1985, and Virginia civil conspiracy law. He seeks damages for lost profits, tuition, and other injuries allegedly caused by EVMS's refusal to correct the grade on his pharmacology exam and EVMS's subsequent decision to expel him from the school. The current case arises from the sixth complaint filed by Lewin. In addition to three voluntary non-suits in Virginia state court, Lewin has unsuccessfully litigated one federal and one state lawsuit. Suffice it to say that the factual and legal history leading up to this case is long and complicated. Although this history does

not merit a full recitation here, it is set forth in the district court opinion. *See Lewin v. Cooke*, 95 F. Supp. 2d 513, 516-19 (E.D. Va. 2000) (*Lewin II*). The district court rejected Lewin's FERPA and state law claims, and we affirm.

I.

The primary thrust of Lewin's current complaint is that the defendants conspired to withhold information from him regarding the pharmacology exam and the circumstances of his dismissal from school, which in turn "caused the dismissal of Mr. Lewin's case [Lewin I] from federal court." Lewin seeks to revive his original claim to correct the grade on his pharmacology exam by alleging that he lost his first federal suit only because the defendants illegally withheld information essential to his case. Upon evaluation of Lewin's complaint, we conclude that all but one of his claims are either barred by res judicata or wholly without merit. As for one of his claims for access to educational records under FERPA § 1232g (a) (1) (A), we will assume *arguendo* that it is not precluded. Nevertheless, Lewin has already received the only remedy to which he is entitled on his claim.

Lewin's complaint recites a number of denials of access to information, most occurring prior to *Lewin I* and a few occurring after *Lewin I*. We will consider the pre-*Lewin I* denials and post-*Lewin I* denials separately.

A.

First, we address those denials of access to information that occurred prior to Lewin's initiation of his first federal suit. Lewin alleges that in 1991 the defendants failed to provide him access to his pharmacology exam within 45 days of his request, as required by § 1232g (a) (1) (A). He also alleges that in 1993 the defendants denied him access to the unabridged tape recording of the hearing and deliberations of the Student Progress Committee (SPC) that voted to expel him, also in violation of § 1232g (a) (1) (A). To the extent that the defendants denied Lewin access to information *prior* to his first

federal lawsuit, these claims are barred by the doctrine of claim preclusion because they are "claims that were raised or could have been raised in the prior litigation." *Pittston Co. v. United States*, 199 F. 3d 694, 704 (4th Cir. 1999).

Both the § 1232g (a) (2) claim brought the *Lewin I* and Lewin's current § 1232g (a) (1) (A) claim allege that the defendants denied Lewin access to documents necessary for him to prove the inaccuracy of the exam. Accordingly, as to Lewin's access claims under § 1232g (a) (1) (A) that accrued prior to his first federal suit, these claims involve the very same facts, are closely related in motivation, and "arise[] out of the same transaction or series of transactions" as his § 1232g (a) (2) claim to correct his educational records. *Id.* (quoting *Harnett v. Billman*, 800 F. 2d 1308, 1313 (4th Cir, 1986). Thus, as to denials of access that occurred prior to *Lewin I*, Lewin could have brought (and arguably did bring) his § 1232g (a) (1) (A) right of access claims in that suit, so he is barred by claim preclusion from relitigating those claims in this suit.

Lewin argues that these pre-*Lewin I* denials of access had not accrued into a full-fledged FERPA §1232g(a)(1)(A) violation because EVMS had not yet manifested a "policy" of denying access to records. If these acts had not accrued into a §1232g(a)(1)(A) claim prior to *Lewin I*, he could not have brought the claim in that suit, and the claim would not be precluded now. While other sections of FERPA are only actionable upon a showing of an improper "policy," §1232g(a)(1)(A) contains no reference to a policy of denying access, but simply provides that students have a "right to inspect and review" their education records within 45 days of a request. *Compare* 20 U.S.C. § 1232g(a)(1)(A) ("right to inspect and review the education records') *with* 20 U.S.C. § 1232g(b)(1) ("a policy or practice of permitting the release of education records . . . without . . . written consent"). Accordingly, Lewin's §1232g(a)(1)(A) claims accrued at the time of each separate denial of access.

B.

Lewin identifies three alleged FERPA right of access violations that he asserts are not barred by claim preclusion because they had not occurred prior to his first suit. Lewin argues that EVMS violated § 1232g (a) (1) (A) by failing to turn over Master Challenge Exam, which is the answer key to the pharmacology exam, within 45 days of his request on March 1, 1996; by allegedly misrepresenting to the United States Department of Education (DOE) the custody status of the SPC deliberations tape; and by again denying him access in January of 1998 to a complete copy of the SPC deliberations.

As to the Master Challenge Exam, FERPA provides a right of access only to a student's "education records" 20 U.S.C. § 1232g (a) (1) (A). That term is defined by FERPA to include records and documents that "contain information directly related to a student." 20 U.S.C. § 1232g (a) (4) (A) (i). The DOE has indicated in a letter to Lewin that the Master Challenge Exam, which is a general answer key, is not directly related to Lewin and does not constitute part of his educational record. The Master Challenge Exam does not contain Lewin's name, nor does it contain any record of his educational performance. While the Master Challenge Exam was certainly relevant to Lewin's § 1232g (a) (2) claim to correct his educational record, and thus discoverable in that action, we agree with the DOE that it is not itself one of Lewin's education records. Accordingly, Lewin has no right of access to the Master Challenge Exam under § 1232g (a) (1) (A).

Moreover, the Master Challenge Exam was turned over prior to the conclusion of the first federal lawsuit. Because Lewin did have access to this document during that suit, the temporary denial of access did not prevent him from using it to support his claim. Lewin points out that the Master Challenge Exam was turned over only one day before the district court granted summary judgment, and he argues that he did not have

adequate time to review and understand the importance of the document. Lewin is barred from now litigating the lateness of the discovery response because he had the opportunity to do that in the first lawsuit. He could have requested a continuance at the summary judgment hearing based on the newly-provided information, or he could have moved for reconsideration once he had the opportunity to appreciate the importance of this document.

Lewin also argues that EVMS violated his right of access by intentionally misrepresenting to the DOE the chain of custody of the SPC deliberations tape. It is not all clear that the statement about custody in EVMS's letter amounted to a misrepresentation. Even if it did, the misrepresentation was made to DOE, not to Lewin. and the DOE nonetheless ordered EVMS to turn over the SPC tape. Thus, the alleged misrepresentation by EVMS does not constitute a denial of access under § 1232g (a) (1) (A).

Finally, Lewin alleges that EVMS's denial of access to the SPC tape in 1998 constitutes a violation of § 1232g (a) (1) (A) that is independent of the claim-barred 1993 denial. It is not clear whether the district court in the first federal suit actually determined the question of Lewin's right of access to the SPC tape. If it did, the issue of Lewin's right to the SPC tape would be barred under the doctrine of issue preclusion. Lewin's complaint in the first case sought broad relief and could plausibly be read to state a claim for access to the tape in addition to his primary claim to correct his educational records. If read that broadly, the district court's dismissal of his complaint would have necessarily determined that he had no right of access to the tape, and the doctrine of issue preclusion would bar Lewin from re-litigating that same issue. On the other hand, Lewin's earlier complaint primarily presented a § 1232g (a) (2) right to correct educational records claim, not a § 1232g (a) (1) (A) right of access claim. The district court opinion granting summary judgment to EVMS did not discuss

whether Lewin had a right to the SPC tape under § 1232g (a) (1) (A). *See Lewin I*, 931 F. Supp. 443. It appears that the SPC tape is part of Lewin's is part of Lewin's education record to which he is entitled access under § 1232g (a) (1) (A), because it is a record maintained by a educational institution that contains information directly related to Lewin. 20 U.S.C. § 1232g (a) (4) (A). The DOE evidently agrees and has instructed EVMS to provide Lewin with a copy of the tape. We are hesitant to read an implied holding into the district court's previous opinion when that holding appears incorrect. When the issue of whether a prior court actually decided an issue is opaque, we should hesitate to preclude that issue in a subsequent case. 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4420, at 184 (1981).

Assuming *arguendo* that Lewin's § 1232g (a) (1) (A) claim for access to the SPC tape is not barred by issue preclusion, that claim is nonetheless moot. Lewin argues that the denial of access to the SPC tape prejudiced his first federal lawsuit. However, the denial of access to the tape in 1998, *after* the resolution of the first case in 1996, clearly could not have prejudiced his lawsuit. His suit could only have been prejudiced by denial of access *prior* to the resolution of the case, but any such denial is barred by claim preclusion, as discussed above. The only injury Lewin suffered as a result of the 1998 denial was his inability to review the tape. Accordingly, the proper remedy for Lewin's § 1232g (a) (1) (A) claim is to order EVMS to provide him access to the tape. Lewin did not even request this remedy in his complaint. Moreover, Lewin's counsel stated in oral argument that Lewin has received a complete copy of the transcript of the SPC tape, including the deliberations section, through the course of discovery in his now-completed state lawsuit. Therefore, Lewin has already received the only form of relief to which he is even arguably entitled, and this claim is moot.

Lewin attempts to rescue this claim from mootness by

asserting a right to nominal damages. Nominal damages are typically available in § 1983 actions to vindicate constitutional rights. *See Carey v. Piphus*, 435 U.S. 247 (1978). It is less clear whether nominal damages are also available in § 1983 actions asserting statutory rights. *Compare Walker v. Anderson Electrical Connectors*, 944 F. 2d 841, 845 (11th Cir. 1991) (holding that nominal damages are not available under Title VII and limiting *Carey's* holding to constitutional violations), *with Peckham v. Continental Cas. Ins. Co.*, 895 F. 2d 830, 841 (1st Cir. 1990) (analogizing *Carey* and affirming an award of nominal damages for a violation of a Massachusetts statute). Even assuming that nominal damages may be available in statutory § 1983 actions, the defendants would enjoy qualified immunity from damages with respect to Lewin's § 1232g (a) (1) (A) claim for access to the SPC tape. Under the doctrine of qualified immunity, governmental officials sued under § 1983 "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory . . . rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The exchange of letters between EVMS and the DOE illustrates that EVMS reasonably believed that the SPC tape was excluded from the definition of education records. The DOE explained that according to its interpretation of FERPA, the SPC tapes did not meet the terms of the exclusion asserted by EVMS. Upon review, we conclude that EVMS's position was a reasonable, if ultimately incorrect, reading of a statutory exclusion that has not been clearly interpreted by the courts. Accordingly, it was not clear at the time of the 1998 denial that the deliberations sections of the SPC tape constituted an "education record" under FERPA , so the defendants would be entitled to qualified immunity on that claim. *Cf. Fox v. Bd. of Trustees of the State Univ. of New York*, 42 F. 3d 135, 141 (2nd Cir. 1994) (noting that even if the possibility of nominal damages might save an otherwise moot § 1983 claim, the government defendants would be immune from damages claims because the rights at issue were not clearly defined).

In sum, claims alleging denial of access to information that accrued prior to Lewin's first federal suit could have been brought in that suit, so Lewin is precluded from litigating these claims in this suit. As to the three incidents that occurred after the initiation of the first federal suit, two of these incidents do not constitute § 1232g(a)(1)(A) violations, and the third is barred by qualified immunity to the extent it is not moot.

Lewin also sued under 42 U.S.C.§ 1985(2), arguing that the defendants conspired to injure his § 1232(g)(a)(2) cause of action in his first federal suit in retaliation for Lewin's testimony, deposition, and oral arguments in that case. The alleged retaliatory acts are, again, the defendants' withholding of information from Lewin. As stated above, the acts of denial of access to information are either barred by claim preclusion or did not cause injury to Lewin's first federal suit. Accordingly, Lewin claim under § 1985(2) also fails.

II.

Lewin also asserts a Virginia state law claim for the defendants' alleged conspiracy to withhold information, and he appeals the district court's dismissal of that claim with prejudice. He argues that the district court should not have exercised supplemental jurisdiction over this state claim after it dismissed his federal claims. Given the related nature of the state and federal claims and the repetitive nature of Lewin's litigation, the district court did not abuse its discretion in retaining supplemental jurisdiction over his state law claim.

As to the merits of Lewin's state conspiracy claim, the district court correctly ruled that this claim is both barred by the doctrine of intracorporate immunity and fails to state a viable cause of action. Because the defendants are all agents of EVMS, they constitute a single legal entity. They are thus legally incapable of conspiracy, which requires multiple parties

acting together. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985). Lewin argues that the doctrine of intracorporate immunity does not apply here because the individual defendants had an independent personal stake in conspiring to defeat Lewin's lawsuit, *see Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F. 2d 391, 399 (4th Cir. 1974), and the defendants' acts were unauthorized by EVMS, *see Buschi v.Kirven*, 775 F. 2d 1240, 1252-53 (4th Cir. 1985). We conclude that neither of these exceptions apply on the facts of this case and that Lewin's conspiracy claim is barred by intracorporate immunity. In addition, Lewin's conspiracy claim relies on the same withholding of information relied on for his § 1985(2) claim, and it fails to state a claim for the same reasons: the alleged claims are either barred by or casually unrelated to his first suit.

III.

Lewin appeals the district court's *sua sponte* imposition of Rule 11 sanctions against him in the amount of $5000. Lewin argues that the district court failed to enter an order to show cause describing the allegedly sanctionable conduct, as required by Fed. R. Civ. P. 11(c)(1)(B). In a hearing on March 14, 1996, the district court clearly put Lewin on notice that the court was considering sanctions, described in detail the specific conduct that might be sanctionable, and requested briefs on the issue from both parties. Both parties briefed the issue, with Lewin filing both an initial and a reply brief. The district court's clear instructions during the March 14, 1996, hearing satisfied the aims of Rule 11(c)(1)(B) and thus in effect constituted as oral order to show cause. *See Cox v. Preferred Tech. Group, Inc.*, 110 F. Supp. 2d 786, 788-89 (N.D. Ind. 2000).

Having determined that the court did not violate the procedural requirements of Rule 11, we review the imposition of sanctions for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The district court determined that Lewin's latest lawsuit had no chance of success under clearly stated precedent, showed a clear intent by Lewin to harass the defendants, and was a blatant attempt to re-litigate previously decided claims. These conclusions are amply supported by the record, and the district court acted well within its discretion in imposing sanctions on Lewin.

IV.

Lewin challenges the district court's award of attorney's fees to the defendants, arguing that the defendants' motion for attorneys' fees was not filed within 14 days of the final judgment and thus was untimely under Fed. R. Civ. P. 54(d)(2)(B). The district court's final judgment dismissing Lewin's suit was entered on May 1, 2000. In this judgment order the court imposed Rule 11 sanctions but withheld quantification of the sanctions pending a determination of Lewin's financial status and the amount of attorneys' fees and costs incurred by the defendants. On June 27, 2000, the district court entered judgment quantifying sanctions in the amount of $5000. In the opinion accompanying this order, the court explained its reasons for imposing sanctions and noted that it declined to impose sanctions in the form of attorneys' fees. The defendants then moved for attorneys' fees pursuant to 42 U.S.C. § 1988 on July 11, 2000, within 14 days of the June 27, 2000, order but more than 14 days after the May 1, 2000, order.

Rule 54(d)(2)(B) requires that a motion for attorneys' fees be filed "no later than 14 days after entry of judgement." The rule defines "judgment" to include "any order from which an appeal lies." Fed. R. Civ. P. 54(a). Lewin argues that the motion for attorneys' fees had to be filed within 14 days of the May 1, 2000, order dismissing the complaint, because the

motion sought fees associated with defending against the complaint. The defendants argue that Rule 54(d)(2)(B) only requires that the a motion be filed within 14 days of any final, appealable judgment, not within 14 days of one specific judgment, and that the June 27, 2000, judgment constitutes a final, appealable judgment.

There are some support for the defendants' argument that any final, appealable judgment suffices to restart the 14-day period for a motion for attorneys' fees. In *Weyant v.Okst*, 198 F. 3d 311 (2d Cir. 1999), the court held that timely postjudgment motions which seek to alter or reverse the judgment, such as Lewin's 60(b) motion for relief from judgment, automatically suspend the finality of the judgment. *Id.* at 314. Accordingly, the court held a motion for attorneys' fees is timely if filed within 14 days of the resolution of such postjudgment motions. *Id.* at 315.

We need not decide in this case whether Lewin's Rule 60 motion to reconsider tolled the finality of the May 1, 2000, judgment. Given the unique nature of the district court's orders on May 1, 2000, and June 27, 2000, the later order sufficed as a final judgment from which the defendants had 14 days to move for attorneys' fees. In the district court's May 1, 2000, order and accompanying opinion, the court requested an estimation of the defendants' attorneys' fees and clearly indicated that it was considering awarding fees as part of its sanctions order. The May 1, 2000, order therefore preserved the issue of the defendants' attorneys' fees until the final order of June 27, 2000, which quantified sanctions, and the defendants had good reason to believe that the district court would treat attorneys' fees as part of Rule 11 sanctions. The June 27, 2000, order resolved for the first time whether the district court would award the defendants their attorneys' fees. Under these circumstances, it was reasonable for the defendants to wait until the district court had ruled on whether sanctions would include attorneys' fees before making their own motion

for fees. Because the question of attorneys' fees was essentially held in abeyance by the May 1, 2000, order until the June 27, 2000, order, that later order constitutes a final judgment for the purposes of Rule 54(d)(2)(B)'s 14-day filing requirement.

On the merits, the decision to award attorneys' fees is within the discretion of the district court. *See DeBauche v. Trani*, 191 F. 3d 499, 512 (4th Cir. 1999); *Cooke v. Cooke*, 474 S.E. 2d 159, 162 (Va. Ct. App. 1995). A prevailing defendant may recover attorneys' fees in § 1983 and § 1985 actions only when the plaintiff's claims were "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The standard for recovering attorney's fees under Virginia state law is analogous. *See* Va. Code Ann. § 8.01-271.1 (West 2001). The district court found that Lewin's lawsuit was brought solely for the purpose of harassment, was asserted in bad faith, and constituted an attempt to relitigate matters already adjucated. These findings are clearly supported by the record, and the district court did not abuse its discretion in awarding attorneys' fees for both Lewin's federal and state claims.

V.

Lewin also appeals the district court's denial of his motion to recuse, and we review this denial for abuse of discretion. *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995). After a thorough review of the record, we conclude that the judge acted in an impartial and even-handed manner. Despite her early concerns, which proved justified, that Lewin's suit was frivolous, the judge provided Lewin ample opportunities to argue and brief his positions, fully considered Lewin's numerous motions, and wrote thorough and careful opinions analyzing Lewin's arguments and justifying her decisions. We find Lewin's motion for recusal wholly without merit, and we affirm the district court's denial of that motion.

VI.

Finally, Lewin appeals the district court's denial of his motion for Rule 11 sanctions. We also review this denial for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Lewin moved for sanctions based on the defendants' allegedly frivolous argument to the district court that Lewin's notice of appeal was pre-mature. The defendants promptly acknowledged their unintentional misstatement of law, which the district court found was both reasonable and non-material. Under these circumstances, Rule 11 sanctions against the defendants are clearly inappropriate. We affirm the district court's denial of Lewin's motion for Rule 11 sanctions.

VII.

For the foregoing reasons, the orders and judgement of the district court are

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 28, 2002

No. 00-1732
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 00-1943
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1165
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1335
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

ORDER

Appellant has filed a motion to add two supplemental pages to the petition for rehearing en banc.

The court grants the motion to add two supplemental pages to the petition for rehearing en banc.

For the Court,

/s/ Patricia S. Conner

CLERK

FILED: March 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1732

JONATHAN LEWIN,

Plaintiff - Appellant,

versus

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,

Defendants - Appellees.

No. 00-1943

JONATHAN LEWIN,

Plaintiff - Appellant,

versus

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,

Defendants - Appellees.

No. 01-1165

JONATHAN LEWIN,

Plaintiff - Appellant,

versus

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,

Defendants - Appellees.

No. 01-1335

JONATHAN LEWIN,

Plaintiff - Appellant,

versus

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,

Defendants - Appellees.

ORDER

Appellant's petition for rehearing en banc was submitted to this Court. As no member of the Court requested a poll on the petition for rehearing en banc, it is ORDERED that the petition for rehearing en banc is denied.

Panel rehearing is granted solely for the purpose of amending one paragraph of the unpublished per curiam opinion issued on January 7, 2002. An order amending the opinion will issue herewith.

Appellant has also filed a motion for publication of the Court's per curiam opinion and has requested en banc consideration of this motion. As no member of the Court has voted for publication of the opinion, it is ORDERED that the motion for publication is denied.

Appellees have filed a motion for sanctions in the form of attorneys' fees and double costs. The panel has considered the motion, and it is ORDERED that the motion for sanctions is denied.

For the Court

Clerk

Filed March 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 00-1732 (L)
(CA-99-2117-2)

JONATHAN LEWIN,

Plaintiff - Appellant

versus

WILLIAM J. COOKE, et al.,

Defendants - Appellees.

ORDER

The court amends its opinion filed January 7, 2002, as follows:

On page 5, third full paragraph - - The paragraph, beginning on the bottom of page 5 and continuing onto the top of page 6, is deleted and is replaced with the following:

Lewin argues that these pre- Lewin I denials of access had not accrued into a full-fledged FERPA § 1232g (a) (1) (A) violation because EVMS had not yet manifested a policy of denying access to records. If these denials had not accrued into a § 1232g (a) (1) (A) claim prior Lewin I, he could not have brought the claim in that suit, and the claim would not be

precluded now. FERPA § 1232g (a) (1) (A) applies to an institution "which has a policy of denying, or which effectively prevents, [eligible students] . . . the right to inspect and review [their] education records." 20 U.S.C. § 1232g (a) (1) (A) (emphasis added). Under the statute an institution "which effectively prevents" a student from access to his education records violates § 1232g (a) (1) (A), regardless of whether it also has a "policy of denying" access to such records. Even if EVMS had not manifested a "policy of denying" access to Lewin's education records prior to his first lawsuit, it had "effectively prevent[ed]" him from inspecting and reviewing those records. Thus, these denials gave rise to claims under § 1232g (a) (1) (A) prior to the first lawsuit. Alternatively, even if EVMS must have manifested a policy of denial in order for a §1232g (a) (1) (A) claim to accrue, Lewin's allegations in this suit include multiple denials of access prior to the first federal lawsuit. In his October 8, 1999, motion for judgment filed in Norfolk Circuit Court (which was subsequently removed to federal court), Lewin alleges at least five separate instances prior to Lewin I in which EVMS faculty or administration denied or refused to consider his repeated requests for access to his exam. He also alleges at least two concurrent denials prior to Lewin I of his requests for access to the full SPC deliberations tape. Taken together, these alleged denials suffice to establish a policy on the part of EVMS of denying access to Lewin's education records. Accordingly, even if a plaintiff must show a policy of denial of access to state a claim under § 1232g (a) (1) (A), Lewin's § 1232g (a) (1) (A) right of access claim had accrued by the commencement of his first federal suit.

Entered at the direction of the panel.

For the Court

/s/ Patricia S. Conner
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 00-1732

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 00-1943

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 01-1165

JONATHAN LEWIN,
Plaintiff - Appellant,

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads,
Defendants - Appellees.

No. 01-1335

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge.
(CA-99-2117-2)

Argued: October 29, 2001

Decided: January 7, 2002

Before WILKINS, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Johan Conrod, Sr., RICHARD J. CONROD, SR., P.C., Virginia Beach, Virginia, for Appellant. Jonathan Barkasy Sprague, POST & SCHELL, P.C., Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** A.James Johnston, POST & SCHELL, P.C., Philadelphia, Pennsylvania; David K. Sutelan, MAYS & VALENTINE, Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

OPINION

PER CURIAM:

Jonathan Lewin has sued the Eastern Virginia Medical School of the Medical College of Hampton Roads (EVMS) and various of EVMS's employees, alleging that the defendants prevailed in Lewin's previous federal lawsuit by improperly and illegally withholding crucial information. In the prior federal case Lewin invoked the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (a) (2), in seeking to challenge the score he received on a pharmacology exam at EVMS. Lewin alleged that two of his answers, which were wrong according to the answer key, were in fact correct. Lewin essentially sought to have a federal court determine, for example, whether chlorothiazide or furosemide is the most appropriate treatment for congestive heart failure. Not surprisingly, the district court dismissed his case, holding that FERPA § 1232g (a) (2) only permits actions to correct ministerial or technical inaccuracies in educational records, not to challenge the substantive scientific accuracy of a pharmacology examination. *See Lewin v. Medical College of Hampton Roads*, 931 F. Supp. 443 (E.D. Va. 1996) (*Lewin I*).

In this case Lewin alleges that the defendants denied him access to crucial educational records so as to prevent him from prevailing in his previous federal lawsuit, in violation of FERPA § 1232g (a) (1) (A), 42 U.S.C. § 1985, and Virginia civil conspiracy law. He seeks damages for lost profits, tuition, and other injuries allegedly caused by EVMS's refusal to correct the grade on his pharmacology exam and EVMS's subsequent decision to expel him from the school. The current case arises from the sixth complaint filed by Lewin. In addition to three voluntary non-suits in Virginia state court, Lewin has unsuccessfully litigated one federal and one state lawsuit. Suffice it to say that the factual and legal history leading up to this case is long and complicated. Although this history does

not merit a full recitation here, it is set forth in the district court opinion. *See Lewin v. Cooke*, 95 F. Supp. 2d 513, 516-19 (E.D. Va. 2000) (*Lewin II*). The district court rejected Lewin's FERPA and state law claims, and we affirm.

I.

The primary thrust of Lewin's current complaint is that the defendants conspired to withhold information from him regarding the pharmacology exam and the circumstances of his dismissal from school, which in turn "caused the dismissal of Mr. Lewin's case [Lewin I] from federal court." Lewin seeks to revive his original claim to correct the grade on his pharmacology exam by alleging that he lost his first federal suit only because the defendants illegally withheld information essential to his case. Upon evaluation of Lewin's complaint, we conclude that all but one of his claims are either barred by res judicata or wholly without merit. As for one of his claims for access to educational records under FERPA § 1232g (a) (1) (A), we will assume *arguendo* that it is not precluded. Nevertheless, Lewin has already received the only remedy to which he is entitled on his claim.

Lewin's complaint recites a number of denials of access to information, most occurring prior to *Lewin I* and a few occurring after *Lewin I*. We will consider the pre-*Lewin I* denials and post-*Lewin I* denials separately.

A.

First, we address those denials of access to information that occurred prior to Lewin's initiation of his first federal suit. Lewin alleges that in 1991 the defendants failed to provide him access to his pharmacology exam within 45 days of his request, as required by § 1232g (a) (1) (A). He also alleges that in 1993 the defendants denied him access to the unabridged tape recording of the hearing and deliberations of the Student Progress Committee (SPC) that voted to expel him, also in violation of § 1232g (a) (1) (A). To the extent that the defendants denied Lewin access to information *prior* to his first

federal lawsuit, these claims are barred by the doctrine of claim preclusion because they are "claims that were raised or could have been raised in the prior litigation." *Pittston Co. v. United States*, 199 F. 3d 694, 704 (4th Cir. 1999).

Both the § 1232g (a) (2) claim brought the *Lewin I* and Lewin's current § 1232g (a) (1) (A) claim allege that the defendants denied Lewin access to documents necessary for him to prove the inaccuracy of the exam. Accordingly, as to Lewin's access claims under § 1232g (a) (1) (A) that accrued prior to his first federal suit, these claims involve the very same facts, are closely related in motivation, and "arise[] out of the same transaction or series of transactions" as his § 1232g (a) (2) claim to correct his educational records. *Id.* (quoting *Harnett v. Billman*, 800 F. 2d 1308, 1313 (4th Cir, 1986). Thus, as to denials of access that occurred prior to *Lewin I*, Lewin could have brought (and arguably did bring) his § 1232g (a) (1) (A) right of access claims in that suit, so he is barred by claim preclusion from relitigating those claims in this suit.

Lewin argues that these pre- Lewin I denials of access had not accrued into a full-fledged FERPA § 1232g (a) (1) (A) violation because EVMS had not yet manifested a policy of denying access to records. If these denials had not accrued into a § 1232g (a) (1) (A) claim prior Lewin I, he could not have brought the claim in that suit, and the claim would not be precluded now. FERPA § 1232g (a) (1) (A) applies to an institution " which has a policy of denying, or which effectively prevents, [eligible students]. . . the right to inspect and review [their] education records." 20 U.S.C. § 1232g (a) (1) (A) (emphasis added). Under the statute an institution "which effectively prevents" a student from access to his education records violates § 1232g (a) (1) (A), regardless of whether it also has a "policy of denying" access to such records. Even if EVMS had not manifested a "policy of denying" access to Lewin's education records prior to his first lawsuit, it had "effectively prevent[ed]" him from inspecting and reviewing

those records. Thus, these denials gave rise to the claims under § 1232g (a) (1) (A) prior to the first lawsuit. Alternatively, even if EVMS must have manifested a policy of denial in order for a § 1232g (a) (1) (A) claim to accrue, Lewin's allegations in this suit include multiple denials of access prior to the first federal lawsuit. In his October 8, 1999, motion for judgment filed in Norfolk Circuit Court (which was subsequently removed to federal court), Lewin alleges at least five separate instances prior to Lewin I in which EVMS faculty or administration denied or refused to consider his repeated requests for access to his exam. He also alleges at least two concurrent denials prior to Lewin I of his requests for access to the full SPC deliberations tape. Taken together, these alleged denials suffice to establish a policy on the part of EVMS of denying access to Lewin's education records. Accordingly, even if a plaintiff must show a policy of denial of access to state a claim under § 1232g (a) (1) (A), Lewin's § 1232g (a) (1) (A) right of access claim had accrued by the commencement of his first federal suit.

B.

Lewin identifies three alleged FERPA right of access violations that he asserts are not barred by claim preclusion because they had not occurred prior to his first suit. Lewin argues that EVMS violated § 1232g (a) (1) (A) by failing to turn over Master Challenge Exam, which is the answer key to the pharmacology exam, within 45 days of his request on March 1, 1996; by allegedly misrepresenting to the United States Department of Education (DOE) the custody status of the SPC deliberations tape; and by again denying him access in January of 1998 to a complete copy of the SPC deliberations.

As to the Master Challenge Exam, FERPA provides a right of access only to a student's "education records" 20 U.S.C. § 1232g (a) (1) (A). That term is defined by FERPA to include records and documents that "contain information directly related to a student." 20 U.S.C. § 1232g (a) (4) (A) (i).

The DOE has indicated in a letter to Lewin that the Master Challenge Exam, which is a general answer key, is not directly related to Lewin and does not constitute part of his educational record. The Master Challenge Exam does not contain Lewin's name, nor does it contain any record of his educational performance. While the Master Challenge Exam was certainly relevant to Lewin's § 1232g (a) (2) claim to correct his educational record, and thus discoverable in that action, we agree with the DOE that it is not itself one of Lewin's education records. Accordingly, Lewin has no right of access to the Master Challenge Exam under § 1232g (a) (1) (A).

Moreover, the Master Challenge Exam was turned over prior to the conclusion of the first federal lawsuit. Because Lewin did have access to this document during that suit, the temporary denial of access did not prevent him from using it to support his claim. Lewin points out that the Master Challenge Exam was turned over only one day before the district court granted summary judgment, and he argues that he did not have adequate time to review and understand the importance of the document. Lewin is barred from now litigating the lateness of the discovery response because he had the opportunity to do that in the first lawsuit. He could have requested a continuance at the summary judgment hearing based on the newly-provided information, or he could have moved for reconsideration once he had the opportunity to appreciate the importance of this document.

Lewin also argues that EVMS violated his right of access by intentionally misrepresenting to the DOE the chain of custody of the SPC deliberations tape. It is not all clear that the statement about custody in EVMS's letter amounted to a misrepresentation. Even if it did, the misrepresentation was made to DOE, not to Lewin. and the DOE nonetheless ordered EVMS to turn over the SPC tape. Thus, the alleged misrepresentation by EVMS does not constitute a denial of access under § 1232g (a) (1) (A).

Finally, Lewin alleges that EVMS's denial of access to the SPC tape in 1998 constitutes a violation of § 1232g (a) (1) (A) that is independent of the claim-barred 1993 denial. It is not clear whether the district court in the first federal suit actually determined the question of Lewin's right of access to the SPC tape. If it did, the issue of Lewin's right to the SPC tape would be barred under the doctrine of issue preclusion. Lewin's complaint in the first case sought broad relief and could plausibly be read to state a claim for access to the tape in addition to his primary claim to correct his educational records. If read that broadly, the district court's dismissal of his complaint would have necessarily determined that he had no right of access to the tape, and the doctrine of issue preclusion would bar Lewin from re-litigating that same issue. On the other hand, Lewin's earlier complaint primarily presented a § 1232g (a) (2) right to correct educational records claim, not a § 1232g (a) (1) (A) right of access claim. The district court opinion granting summary judgment to EVMS did not discuss whether Lewin had a right to the SPC tape under § 1232g (a) (1) (A). *See Lewin I*, 931 F. Supp. 443. It appears that the SPC tape is part of Lewin's is part of Lewin's education record to which he is entitled access under § 1232g (a) (1) (A), because it is a record maintained by a educational institution that contains information directly related to Lewin. 20 U.S.C. § 1232g (a) (4) (A). The DOE evidently agrees and has instructed EVMS to provide Lewin with a copy of the tape. We are hesitant to read an implied holding into the district court's previous opinion when that holding appears incorrect. When the issue of whether a prior court actually decided an issue is opaque, we should hesitate to preclude that issue in a subsequent case. 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4420, at 184 (1981).

Assuming *arguendo* that Lewin's § 1232g (a) (1) (A) claim for access to the SPC tape is not barred by issue preclusion, that claim is nonetheless moot. Lewin argues that the denial of access to the SPC tape prejudiced his first federal

lawsuit. However, the denial of access to the tape in 1998, *after* the resolution of the first case in 1996, clearly could not have prejudiced his lawsuit. His suit could only have been prejudiced by denial of access *prior* to the resolution of the case, but any such denial is barred by claim preclusion, as discussed above. The only injury Lewin suffered as a result of the 1998 denial was his inability to review the tape. Accordingly, the proper remedy for Lewin's § 1232g (a) (1) (A) claim is to order EVMS to provide him access to the tape. Lewin did not even request this remedy in his complaint. Moreover, Lewin's counsel stated in oral argument that Lewin has received a complete copy of the transcript of the SPC tape, including the deliberations section, through the course of discovery in his now-completed state lawsuit. Therefore, Lewin has already received the only form of relief to which he is even arguably entitled, and this claim is moot.

Lewin attempts to rescue this claim from mootness by asserting a right to nominal damages. Nominal damages are typically available in § 1983 actions to vindicate constitutional rights. *See Carey v. Piphus*, 435 U.S. 247 (1978). It is less clear whether nominal damages are also available in § 1983 actions asserting statutory rights. *Compare Walker v. Anderson Electrical Connectors*, 944 F. 2d 841, 845 (11th Cir. 1991) (holding that nominal damages are not available under Title VII and limiting *Carey's* holding to constitutional violations), *with Peckham v. Continental Cas. Ins. Co.*, 895 F. 2d 830, 841 (1st Cir. 1990) (analogizing *Carey* and affirming an award of nominal damages for a violation of a Massachusetts statute). Even assuming that nominal damages may be available in statutory § 1983 actions, the defendants would enjoy qualified immunity from damages with respect to Lewin's § 1232g (a) (1) (A) claim for access to the SPC tape. Under the doctrine of qualified immunity, governmental officials sued under § 1983 "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory . . . rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The exchange of letters between EVMS and the DOE illustrates that EVMS reasonably believed that the SPC tape was excluded from the definition of education records. The DOE explained that according to its interpretation of FERPA, the SPC tapes did not meet the terms of the exclusion asserted by EVMS. Upon review, we conclude that EVMS's position was a reasonable, if ultimately incorrect, reading of a statutory exclusion that has not been clearly interpreted by the courts. Accordingly, it was not clear at the time of the 1998 denial that the deliberations sections of the SPC tape constituted an "education record" under FERPA, so the defendants would be entitled to qualified immunity on that claim. *Cf. Fox v. Bd. of Trustees of the State Univ. of New York*, 42 F. 3d 135, 141 (2nd Cir. 1994) (noting that even if the possibility of nominal damages might save an otherwise moot § 1983 claim, the government defendants would be immune from damages claims because the rights at issue were not clearly defined).

In sum, claims alleging denial of access to information that accrued prior to Lewin's first federal suit could have been brought in that suit, so Lewin is precluded from litigating these claims in this suit. As to the three incidents that occurred after the initiation of the first federal suit, two of these incidents do not constitute § 1232g(a)(1)(A) violations, and the third is barred by qualified immunity to the extent it is not moot.

Lewin also sued under 42 U.S.C. § 1985(2), arguing that the defendants conspired to injure his § 1232(g)(a)(2) cause of action in his first federal suit in retaliation for Lewin's testimony, deposition, and oral arguments in that case. The alleged retaliatory acts are, again, the defendants' withholding of information from Lewin. As stated above, the acts of denial of access to information are either barred by claim preclusion or did not cause injury to Lewin's first federal suit. Accordingly, Lewin claim under § 1985(2) also fails.

II.

Lewin also asserts a Virginia state law claim for the defendants' alleged conspiracy to withhold information, and he appeals the district court's dismissal of that claim with prejudice. He argues that the district court should not have exercised supplemental jurisdiction over this state claim after it dismissed his federal claims. Given the related nature of the state and federal claims and the repetitive nature of Lewin's litigation, the district court did not abuse its discretion in retaining supplemental jurisdiction over his state law claim.

As to the merits of Lewin's state conspiracy claim, the district court correctly ruled that this claim is both barred by the doctrine of intracorporate immunity and fails to state a viable cause of action. Because the defendants are all agents of EVMS, they constitute a single legal entity. They are thus legally incapable of conspiracy, which requires multiple parties acting together. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985). Lewin argues that the doctrine of intracorporate immunity does not apply here because the individual defendants had an independent personal stake in conspiring to defeat Lewin's lawsuit, *see Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F. 2d 391, 399 (4th Cir. 1974), and the defendants' acts were unauthorized by EVMS, *see Buschi v.Kirven*, 775 F. 2d 1240, 1252-53 (4th Cir. 1985). We conclude that neither of these exceptions apply on the facts of this case and that Lewin's conspiracy claim is barred by intracorporate immunity. In addition, Lewin's conspiracy claim relies on the same withholding of information relied on for his § 1985(2) claim, and it fails to state a claim for the same reasons: the alleged claims are either barred by or casually unrelated to his first suit.

III.

Lewin appeals the district court's *sua sponte* imposition of Rule 11 sanctions against him in the amount of $5000. Lewin argues that the district court failed to enter an order to show cause describing the allegedly sanctionable conduct, as required by Fed. R. Civ. P. 11(c)(1)(B). In a hearing on March 14, 1996, the district court clearly put Lewin on notice that the court was considering sanctions, described in detail the specific conduct that might be sanctionable, and requested briefs on the issue from both parties. Both parties briefed the issue, with Lewin filing both an initial and a reply brief. The district court's clear instructions during the March 14, 1996, hearing satisfied the aims of Rule 11(c)(1)(B) and thus in effect constituted as oral order to show cause. *See Cox v. Preferred Tech. Group, Inc.*, 110 F. Supp. 2d 786, 788-89 (N.D. Ind. 2000).

Having determined that the court did not violate the procedural requirements of Rule 11, we review the imposition of sanctions for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The district court determined that Lewin's latest lawsuit had no chance of success under clearly stated precedent, showed a clear intent by Lewin to harass the defendants, and was a blatant attempt to re-litigate previously decided claims. These conclusions are amply supported by the record, and the district court acted well within its discretion in imposing sanctions on Lewin.

IV.

Lewin challenges the district court's award of attorney's fees to the defendants, arguing that the defendants' motion for attorneys' fees was not filed within 14 days of the final judgment and thus was untimely under Fed. R. Civ. P. 54(d)(2)(B). The district court's final judgment dismissing Lewin's suit was entered on May 1, 2000. In this judgment

order the court imposed Rule 11 sanctions but withheld quantification of the sanctions pending a determination of Lewin's financial status and the amount of attorneys' fees and costs incurred by the defendants. On June 27, 2000, the district court entered judgment quantifying sanctions in the amount of $5000. In the opinion accompanying this order, the court explained its reasons for imposing sanctions and noted that it declined to impose sanctions in the form of attorneys' fees. The defendants then moved for attorneys' fees pursuant to 42 U.S.C. § 1988 on July 11, 2000, within 14 days of the June 27, 2000, order but more than 14 days after the May 1, 2000, order.

Rule 54(d)(2)(B) requires that a motion for attorneys' fees be filed "no later than 14 days after entry of judgement." The rule defines "judgment" to include "any order from which an appeal lies." Fed. R. Civ. P. 54(a). Lewin argues that the motion for attorneys' fees had to be filed within 14 days of the May 1, 2000, order dismissing the complaint, because the motion sought fees associated with defending against the complaint. The defendants argue that Rule 54(d)(2)(B) only requires that the a motion be filed within 14 days of any final, appealable judgment, not within 14 days of one specific judgment, and that the June 27, 2000, judgment constitutes a final, appealable judgment.

There are some support for the defendants' argument that any final, appealable judgment suffices to restart the 14-day period for a motion for attorneys' fees. In *Weyant v. Okst*, 198 F. 3d 311 (2d Cir. 1999), the court held that timely postjudgment motions which seek to alter or reverse the judgment, such as Lewin's 60(b) motion for relief from judgment, automatically suspend the finality of the judgment. *Id.* at 314. Accordingly, the court held a motion for attorneys' fees is timely if filed within 14 days of the resolution of such postjudgment motions. *Id.* at 315.

We need not decide in this case whether Lewin's Rule

60 motion to reconsider tolled the finality of the May 1, 2000, judgment. Given the unique nature of the district court's orders on May 1, 2000, and June 27, 2000, the later order sufficed as a final judgment from which the defendants had 14 days to move for attorneys' fees. In the district court's May 1, 2000, order and accompanying opinion, the court requested an estimation of the defendants' attorneys' fees and clearly indicated that it was considering awarding fees as part of its sanctions order. The May 1, 2000, order therefore preserved the issue of the defendants' attorneys' fees until the final order of June 27, 2000, which quantified sanctions, and the defendants had good reason to believe that the district court would treat attorneys' fees as part of Rule 11 sanctions. The June 27, 2000, order resolved for the first time whether the district court would award the defendants their attorneys' fees. Under these circumstances, it was reasonable for the defendants to wait until the district court had ruled on whether sanctions would include attorneys' fees before making their own motion for fees. Because the question of attorneys' fees was essentially held in abeyance by the May 1, 2000, order until the June 27, 2000, order, that later order constitutes a final judgment for the purposes of Rule 54(d)(2)(B)'s 14-day filing requirement.

On the merits, the decision to award attorneys' fees is within the discretion of the district court. *See DeBauche v. Trani*, 191 F. 3d 499, 512 (4th Cir. 1999); *Cooke v. Cooke*, 474 S.E. 2d 159, 162 (Va. Ct. App. 1995). A prevailing defendant may recover attorneys' fees in § 1983 and § 1985 actions only when the plaintiff's claims were "frivolous, unreasonable, or without foundation." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The standard for recovering attorney's fees under Virginia state law is analogous. *See* Va. Code Ann. § 8.01-271.1 (West 2001). The district court found that Lewin's lawsuit was brought solely for the purpose of harassment, was asserted in bad faith, and constituted an attempt to relitigate matters already adjucated. These findings are clearly supported by the record, and the district court did

not abuse its discretion in awarding attorneys' fees for both Lewin's federal and state claims.

V.

Lewin also appeals the district court's denial of his motion to recuse, and we review this denial for abuse of discretion. *United States v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995). After a thorough review of the record, we conclude that the judge acted in an impartial and even-handed manner. Despite her early concerns, which proved justified, that Lewin's suit was frivolous, the judge provided Lewin ample opportunities to argue and brief his positions, fully considered Lewin's numerous motions, and wrote thorough and careful opinions analyzing Lewin's arguments and justifying her decisions. We find Lewin's motion for recusal wholly without merit, and we affirm the district court's denial of that motion.

VI.

Finally, Lewin appeals the district court's denial of his motion for Rule 11 sanctions. We also review this denial for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Lewin moved for sanctions based on the defendants' allegedly frivolous argument to the district court that Lewin's notice of appeal was pre-mature. The defendants promptly acknowledged their unintentional misstatement of law, which the district court found was both reasonable and non-material. Under these circumstances, Rule 11 sanctions against the defendants are clearly inappropriate. We affirm the district court's denial of Lewin's motion for Rule 11 sanctions.

VII.

For the foregoing reasons, the orders and judgement of the district court are

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 5, 2002

No. 00-1732
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 00-1943
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1165
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1335
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 11, 2002

No. 00-1732
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 00-1943
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1165
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

No. 01-1335
CA-99-2117-2

JONATHAN LEWIN

Plaintiff - Appellant

v.

WILLIAM J. COOKE; CLINTON H. TOEWE, II; JAMES E. ETHERIDGE, JR.; ROBERT M. MCCOMBS; JAMES F. LIND; THOMAS J. MANSER; MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a Eastern Virginia Medical School of the Medical College of Hampton Roads

Defendants - Appellees

ORDER

Appellant has filed a motion and an amended motion to publish.

The Court denies the motions.

For the Court,

/s/ Patricia S. Connor

CLERK

United States District Court
Eastern District of Virginia
Norfolk Division

JONATHAN LEWIN,

Plaintiff,

v. CIVIL ACTION NO. 2:99cv2117

WILLIAM J. COOKE,
CLINTON H. TOEWE, II
JAMES E. ETHERIDGE, JR.,
ROBERT M. MCCOMBS,
JAMES F. LIND,
THOMAS J. MANSER, and
MEDICAL COLLEGE OF HAMPTON ROADS,
a/k/a EASTERN VIRGINIA MEDICAL SCHOOL
OF THE MEDICAL COLLEGE OF HAMPTON ROADS,

Defendants.

OPINION

The present matter comes before the court on plaintiff's motion to remand and defendants' motion to dismiss or, in the alternative, for summary judgment. For the reasons set forth below, plaintiff's motion is **DENIED** and defendants' motion is **GRANTED**. Moreover, as the court finds that plaintiff's claims are wholly frivolous and part of an ongoing campaign to harass defendants, the court **SANCTIONS** plaintiff, pursuant to Federal Rule of Civil Procedure 11, pending a determination of plaintiff's financial status and the reasonable attorney's fees and costs incurred by defendants in this lawsuit.

I. Factual and Procedural History

The suit presently before the court represents the sixth lawsuit filed by plaintiff, Jonathan Lewin, against defendants arising out of a 1991 pharmacology examination score that plaintiff contends resulted from substantively defective examination questions. Plaintiff is a former medical student at Eastern Virginia Medical School ("EVMS"). During his second year at EVMS, in April 1991, plaintiff requested a leave of absence and permission to postpone registration for a required course in pharmacology. EVMS granted the request, contingent upon plaintiff successfully completing a pharmacology course at another school and passing a school administered pharmacology "challenge" examination (the "challenge" exam) designed to measure competency in the subject. Although plaintiff successfully completed a pharmacology course at another school, he failed the "challenge" exam by a small margin.

Plaintiff requested an opportunity to inspect and review the examination. Although EVMS initially opposed plaintiff's request to review the exam, he ultimately was permitted an opportunity to do so. Upon review, plaintiff concluded that two of the questions he had missed were defective. EVMS, maintaining that the questions were valid, refused plaintiff's request for reconsideration of his score.

Over the course of the next two years, Lewin had numerous other difficulties as a student at EVMS, and in March 1993, the Student Progress Committee ("SPC") convened a hearing to evaluate plaintiff's future at EVMS. Plaintiff appeared with his attorney to correct what he perceived as misinformation in his academic record, including the results of the 1991 "challenge" exam, which he believed to be inaccurate due to the allegedly defective questions. Based upon a complete review of plaintiff's academic record, however, the SPC determined that plaintiff had not demonstrated the level of

academic achievement or professional judgment necessary to earn a medical degree from EVMS and, therefore, dismissed plaintiff from the medical school.

Plaintiff, believing that the committee had made an improper decision based upon incorrect information, including his failure of the "challenge" exam, requested an unabridged version of a tape recording of the deliberations of the SPC in order to challenge the basis for the committee's decision to expel him. Although he was permitted to listen to an abridged version, his request for the complete deliberations was denied.

Plaintiff subsequently filed six lawsuits against the defendants based upon these events. Plaintiff filed his first suit ("Lewin I") in the Circuit Court of the City of Norfolk on December 6, 1993, alleging fifteen separate counts, all of which pertained to the initial withholding of plaintiff's "challenge" exam and the denial of access to the documents used to score the examination. See Lewin v. Cooke, L93-4524 (Norfolk Cir. Ct. filed December 6, 1993). Plaintiff took a voluntary non-suit in that case on November 29, 1994.

Plaintiff filed a second motion for judgment ("Lewin II") in the Circuit Court of the City of Norfolk on March 24, 1994. See Lewin v. Cooke, L94-1037 (Norfolk Cir. Ct. filed March 24, 1994). In that action, plaintiff alleged that defendants acted improperly in failing to provide access to the complete recording of the SPC deliberations. On March 23, 1995, before service of process, however, the Circuit Court entered a second voluntary non-suit at plaintiff's request.

One day later, plaintiff filed another suit ("Lewin III") against defendants in federal court, alleging denial of plaintiff's constitutional rights, violation of the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g (West 1990 & Supp. 1994), violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (West Supp. 1995), and various state

law claims, all based upon the 1991 "challenge" exam score and plaintiff's subsequent dismissal from EVMS. Plaintiff's constitutional claims and Rehabilitation Act claims were dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6), on January 12, 1996, see Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161, 1996 U.S. Dist. LEXIS 1437 (E.D. Va. 1996); and plaintiff's FERPA claims, raised pursuant to 42 U.S.C. § 1983 (West 1994 & Supp. 1999), were dismissed on motion for summary judgment on August 2, 1996, on the basis that FERPA does not create a federal right to challenge the substantive accuracy of an academic evaluation, see Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443 (E.D. Va. 1996). With the federal claims dismissed, the court declined to exercise supplemental jurisdiction over the remaining state law claims, warning plaintiff that these claims were so frivolous as to warrant sanctions should be choose to pursue them in state court. See id. at 447; (Def. Br. Opp. Remand Ex. 1 at 7-8) [hereinafter Lewin III Tr. Summ. J. Hr'g]. Plaintiff, nonetheless, filed these claims in state court ("Lewin IV") immediately following the final dismissal of Lewin III. After three years of litigation, Lewin IV was also dismissed on motion for summary judgment. Lewin v. Medical College of Hampton Roads, L96-2753, slip op. at 2-3 (Norfolk Cir. Ct. Feb. 4, 2000.)[1]

While Lewin IV was pending, however, plaintiff filed two more suits against defendants arising out of the same events. On April 14, 1998, plaintiff filed, in Norfolk Circuit Court, his fifth suit against defendants ("Lewin V"), but again declined to serve process and voluntarily withdrew the case one year later. See Lewin v. Steinberg, L98-0926 (Norfolk Cir. Ct. filed April 14, 1998). Then, on October 8, 1999, the day after all parties participated in a conference designed to limit the issues in Lewin IV, and after the state court expressed concerns over the

[1]The Norfolk Circuit Court retained jurisdiction of the case for the limited purpose of deciding defendants' motion for sanctions.

validity of plaintiff's claim in Lewin IV, plaintiff filed a sixth motion for judgment ("Lewin VI"), which was substantively identical to that filed in Lewin V. See Lewin v. Cooke, L-99-2448 (Norfolk Cir. Ct. filed October 8, 1999). Once again, however, plaintiff did not serve process. In fact, plaintiff apparently made a "strategic decision" to conceal the pendency of this new suit from defendants, allowing defendants to participate in a settlement conference in Lewin IV on October 20, 1999. (Pl. Mem. Supp. Remand Ex. 2 at 28) [hereinafter Lewin IV Tr. Rule 4:13 Hr'g]. The Clerk of the Norfolk Circuit Court advised counsel, sometime after October 20, 2000, of the filing of Lewin VI, and defendants removed the case to this court on December 27, 2000.

Plaintiff, in this most recent lawsuit, alleges three causes of action, all of which, once again, pertain to the 1991 "challenge" exam and plaintiff's demand for an unabridged copy of the SPC deliberations: (1) plaintiff seeks relief, pursuant to 42 U.S.C. § 1983, for defendants' alleged interference with his efforts to obtain discovery of a master copy of the "challenge" exam and the unabridged SPC deliberations in the course of prior litigation, alleging that defendants' actions prevented him from proving through the courts that he should have received a higher score on the exam and should not have been dismissed from EVMS; (2) plaintiff seeks relief, pursuant to 42 U.S.C. § 1985 (West 1994), alleging that defendants conspired to withhold the "challenge" exam and SPC recording in retaliation for plaintiff "belonging to that class of students who challenge academic authority by trying to enforce student rights," (Compl. ¶ 57), and for providing unfavorable deposition testimony; and (3) plaintiff asserts a state law civil conspiracy claim against defendants also on the basis of the alleged conspiracy to "withhold crucial proof," (Compl. ¶ 49), and defeat plaintiff's lawsuits.

Defendants filed a joint motion to dismiss or, in the alternative, for summary judgment on the grounds that

plaintiff's claims are barred by the statute of limitations[2] and the doctrine of res judicata and that plaintiff's conspiracy claims fail, on the face of the complaint, to state a claim on which relief can be granted. Plaintiff, requesting an extension of time to respond to defendants' motion,[3] filed a motion to remand all proceedings to the Norfolk Circuit Court. The parties came before the court for a hearing on these motions on March 14, 2000. The court took both motions under advisement, but allowed plaintiff additional time to respond to defendants' motion to dismiss or, in the alternative, for summary judgment. The court also warned plaintiff that sanctions would be considered, setting forth the basis for such sanctions, and ordering both parties to file memoranda of law and necessary supporting documentation on this issue. Both parties have so filed, and the motions are now ripe for decision.

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[2]Although it appeared, at first blush, that plaintiff's claims would be barred by the statute of limitations, plaintiff informed the court, during the March 14, 2000, hearing on these motions, that he had tolled the statute of limitations by filing the Lewin V motion for judgment. Until that date, neither the court nor defendants were aware that Lewin V had ever been filed. Now, with the full history of litigation between the parties presumably before the court, it appears that defendants are correct that the statute of limitations was technically tolled by the filing of Lewin V. In fact, it appears to the court that over the course of the past seven years plaintiff engaged a strategy of filing stealth lawsuits on the eve of the expiration of the statute of limitations, allowing them to lie dormant, and then voluntarily dismissing them pursuant to Va. Code § 8.01-380 (Michie 1992), in order to take advantage of the six month tolling from the time of non-suit. See Va. Code § 8.01-229 (E)(3)(Michie 1992). With artful pleading and technical manipulation of the statute of limitations, it was possible for plaintiff to have at least one lawsuit pending at all times in the event another of his suits was dismissed.

[3]For the reasons stated from the bench during the March 14, 2000, hearing, the court denied plaintiff's request for an indefinite extension of time to respond to the motion to dismiss or, in the alternative, for summary judgment, but allowed plaintiff one week within which to file his response.

II. Motion to Remand

Plaintiff states essentially two grounds in support of his motion to remand. First, plaintiff argues that the case should be remanded on the basis that defendants' notice of removal was untimely under 28 U.S.C. § 1446(b) (West 1994). Alternatively, plaintiff argues that, even had the notice been timely filed, various doctrines of abstention warrant remand. Neither argument is availing.

Title 28 U.S.C. § 1446(b) provides, in relevant part, that a notice of removal shall be filed, "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . . ." In response to the confusion generated by the ambiguous language of § 1446(b), the Supreme Court recently articulated a bright-line test as to when the thirty-day time period for filing a notice of removal begins to run:

> First, if the summons and complaint are served together, the 30-day period for removal runs at once. Second, if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant's receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Finally, if the complaint is filed in court prior to any service the removal period runs from service of the summons.

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354 (1999) (holding that thirty-day removal period began to run, not when defendant received faxed, file-stamped copy of the complaint, but rather when defendant was formally

served by certified mail). Although it is clear that plaintiff never served defendants with a summons in this case, the Supreme Court in Murphy Bros. also acknowledged that waiver of service may obviate the need for summons in certain circumstances. See id. at 351 ("Unless a named defendant agrees to waive service, the summons continues to function as the sine qua non directing an individual to participate in a civil action.") (emphasis added).

Relying upon this caveat in the Supreme Court's opinion, plaintiff argues that Virginia state law recognizes that a "general appearance" by a defendant may constitute a waiver of service of process, see Gilpin v. Joyce 257 Va. 579, 581 (1999), and states that defendants, in the case at bar, entered such a general appearance, waiving service, on November 15, 1999. Specifically, plaintiff states that, during a pre-trial hearing convened in Lewin IV on November 15, 1999, counsel for defendants, having recently learned of the filing of Lewin IV from the Clerk of Court, notified the presiding judge that this most recent case had been filed and was pending in Norfolk Circuit Court on grounds substantially related to the issues pending in Lewin IV. According to plaintiff, this statement to the presiding judge in Lewin IV constituted a general appearance on the merits of Lewin VI, such that defendants should be deemed to have waived service of process, triggering the thirty-day period for removal on November 15, 1999, and rendering the December 27, 1999, petition for removal untimely.

In support of this argument, plaintiff relies on the Virginia Supreme Court's decision in Lake Bowling Alley v. Richmond, 116 Va. 429 (1914), for the proposition that Virginia defines "general appearance" quite liberally, such that minimal activity by a defendant could be deemed an appearance on the merits of a case. A cursory review of the Lake Bowling Alley decision, however, reveals that plaintiff's reliance is misplaced. Indeed, the facts of Lake Bowling Alley differ significantly from those

in the present case. In that case, a party who had been served with defective process on an order to show cause by the city assessor, sought to contest the sufficiency of process after damages had been conclusively determined and approved by the mayor. See id. at 98-99. The court held that any objection to service of process had been waived by the party's appearance on the merits of the case. See id. The court found a general appearance in that case based upon a letter of apology received by the city assessor the day after the scheduled show cause hearing, wherein the party ordered to show cause acknowledged receipt of the order, raised no objection to the sufficiency of service, and set forth the objections to the damage assessment rendered by the city assessor that the party had intended to raise at the show cause hearing. See id. Notably, the court in that case based its decision on the fact that the defending party had appeared on the merits of the show cause order as part of the particular proceeding at issue. See id.

This holding, however, hardly supports plaintiff's argument that defendants may, simply by virtue of raising related issues in a collateral proceeding, be deemed to have entered a general appearance on the merits of this case. Virginia courts have, in fact, expressly held that a defendant cannot be deemed to have appeared in a particular case, unless the defendant actually appears in the specific proceeding at issue. See Sever v. Alwardt, 45 Va. Cir. 10, 11 (Va. Cir. 1997) (holding that where defendant responded to complaint by filing a disciplinary charge against the plaintiff-attorney regarding the complaint, the filing of the charge by the defendant did not constitute a general appearance in the underlying lawsuit).

Defendants, in the instant case, clearly did not voluntarily appear to litigate the merits of Lewin VI. Defendants never filed any responsive pleadings prior to removal, and no activity was ever reflected on the docket of this case while in Norfolk Circuit Court. To the contrary, it is abundantly clear from the transcript of the pre-trial conference that defense counsel raised

the matter of the pending motion for judgment in this case, not as an appearance on the merits of Lewin VI, but rather in an effort to keep the judge presiding over Lewin IV abreast of the status of the ongoing litigation between the parties. (Lewin IV Tr. Rule 4:13 Hr'g at 15-25). As such, and in accordance with the Supreme Court's holding in Murphy Bros., this court finds the defendants' petition for removal, filed on December 27, 1999, prior to service of process, was timely in accordance with 28 U.S.C. § 1446(b).

Alternatively, plaintiff argues that, even if the petition for removal was timely, four distinct abstention doctrines favor remand of this case. Without addressing the applicability of the various abstention doctrines to the facts of the instant case, however, it is abundantly clear that plaintiff's reliance on the equitable doctrines of abstention is misplaced. The Supreme Court has conclusively held that abstention doctrines are simply not applicable to suits for damages, but apply only to suits in equity. See Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 707 (1996) ("Federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable or otherwise discretionary.") (emphasis added).[4] Plaintiff seeks only monetary damages. Accordingly, as defendants' notice of removal was appropriate and timely, plaintiff's motion to remand must be denied.

III. Motion to Dismiss or, in the Alternative, for Summary Judgment

Upon removing this case to federal court, defendants filed a joint motion to dismiss pursuant Rule 12(b)(6) or, in the

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[4]While the facts in Quackenbush pertained specifically to abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943), both the rationale and dicta of the Court would extend its holding to all of the abstention doctrines. See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996). In fact, the Court discussed the applicability of its holding to all abstension doctrines generally. See id.

alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. When determining a motion to dismiss under Rule 12(b)(6), the court should accept the facts alleged in the complaint as true and construe them in favor of the plaintiff. See Scheur v. Rhodes, 416 U.S. 232, 236 (1974). A motion to dismiss should be granted if the plaintiff's complaint has failed "to state a claim upon which relief can be granted." Fed. R. Civ. P.12(b)(6). When additional material is considered by the court which is outside the pleadings, the court should treat the motion to dismiss as one for summary judgment. See Fed. R. Civ. P. 12(b). Rule 56(c) provides that a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In order to withstand a motion for summary judgment, the plaintiff must establish the existence of a genuine issue of material fact by presenting evidence on which the jury could reasonably find in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). After a thorough review of the full record in this case and oral argument by the parties, it is clear that each of plaintiff's claims must be dismissed in accordance with these standards.

A. Res Judicata

First, as defendants correctly argue, plaintiff's most recent complaint is, in effect, an effort to resurrect FERPA based claims that this court has previously dismissed on summary judgment, employing just slight variations in legal theory to mask an otherwise transparent attempt to deny defendants repose from litigation in this matter. As set forth above in Section I, plaintiff's most recent complaint alleges three causes of action, all of which, once again, pertain in the 1991 "challenge" exam and plaintiff's demand for an unabridged copy of the SPC deliberations: (1) plaintiff seeks relief, pursuant to

42 U.S.C. § 1983, for defendants' alleged interference with his efforts to obtain discovery of a master copy of the "challenge" exam and the unabridged SPC deliberations in the course of prior litigation, alleging that defendants' actions prevented him from proving through the courts that he should have received a higher score on the exam and should not have been dismissed from EVMS; (2) plaintiff seeks relief, pursuant to 42 U.S.C. § 1985, alleging that defendants conspired to withhold these materials and interfere with his property interest in his lawsuits, in retaliation for plaintiff "belonging to that class of students who challenge academic authority by trying to enforce student rights," (Compl. ¶ 57), and for providing unfavorable deposition testimony; and (3) plaintiff asserts a state law civil conspiracy claim against defendants also based upon the alleged conspiracy to "withhold crucial proof," (Compl. ¶ 49), and defeat plaintiff's lawsuits.[5] Despite plaintiff's artful pleading and strategic manipulation of the statute of limitations, it is apparent that plaintiff's claims are barred by the doctrine of res judicata.

Under res judicata principles, a prior judgment between the same parties precludes subsequent litigation of matters resolved in the first adjudication. See Allen v. McCurry, 449 U.S. 90, 94 (1980); First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough, 81 F.3d 1310, 1314-15 (4th Cir. 1996); Restatement (Second) of Judgments, § 13 et seq (1982). "The doctrine encompasses two concepts: claim preclusion and issue preclusion." First Union Commercial Corp., 81 F.3d at 1315 (citing Allen, 449 U.S. at 94). These related doctrines "seek to relieve parties of the cost of multiple lawsuits, prevent inconsistent verdicts, conserve judicial resources and encourage

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[5]It also appears that plaintiff may intend to assert a claim of conspiracy based on defendants' waiver of service of process in Lewin IV, on the grounds that such waiver forced plaintiff to proceed with claims that he apparently intended, once again, to keep dormant strictly in an effort to "preserve the statute of limitations." (Compl. ¶ 53.) To the extent plaintiff so intends, the court merely notes that answering a lawsuit simply cannot constitute a conspiracy to harm the plaintiff.

reliance on adjudications." Paragon Serv., Inc. v. Hicks, 843 F. Supp. 1077, 1079 (E.D. Va. 1994) (citing Allen, 449 U.S. at 94). Rules of claim preclusion provide that, if the later litigation arises from the same cause of action as the first, then the judgment bars litigation of every matter that was or might have been adjudicated in the earlier suit. See First Union Commercial Corp., 81 F.3d at 1315 (citing e.g., Nevada v. United States, 463 U.S. 110, 129-30 (1983). Subsequent litigation will be barred by claim preclusion where there is: (1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies to the two suits. See Meekins v. United Transp. Union, 946 F. 2d 1054. 1057 (4th Cir. 1991).

Issue preclusion forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." Virginia Hosp. Ass'n v. Bailes, 830 F.2d 1308, 1311 (4th Cir. 1987). Issue preclusion will apply where: (1) the issue sought to be precluded is identical to an issue previously litigated; (2) the issue was actually determined in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted has had a full and fair opportunity to litigate the issue in the previous forum. See Ramsay v. INS, 14 F.3d 206, 210 (4th Cir. 1994). Each of plaintiff's three claims are barred by these related principles of res judicata.

First, and perhaps most obviously, excepting the date on which the alleged violations occurred, plaintiff's FERPA based § 1983 claims in the present suit are substantively identical to those that this court dismissed on summary judgment in Lewin III. In Lewin III, plaintiff stated a claim against defendants, pursuant to 42 U.S.C. § 1983, alleging that defendants violated his FERPA rights by delaying his access to the "challenge" exam and refusing to produce an unabridged copy of the SPC

deliberations. (Def. Mem. Supp. Mot. Dismiss / Summ. J. Ex. D, ¶ ¶ 23-32, 62-63) [hereinafter Lewin III Am. Compl.]. Plaintiff sought relief on the basis that, but for these alleged FERPA violations, plaintiff could have proven that he should have passed the "challenge" exam and that he should not have been terminated from EVMS. (Lewin III Am. Compl. ¶ ¶ 64, 81). The court dismissed these claims, holding that FERPA does not provide an avenue by which students may legally challenge the substantive accuracy of academic evaluations, and the Fourth Circuit affirmed per curiam. See Lewin, 931 F. Supp. at 446-447, affirmed, 1997 U.S. App. LEXIS 20851, *1 (4th Cir. Aug. 5, 1997). Plaintiff now seeks to relitigate precisely these same issues by essentially arguing that defendants did it again - - again, defendants allegedly delayed producing requested "challenge" exam materials; again, they refused to produce unabridged copy of the SPC deliberations; and again, plaintiff was prevented from proving that his "challenge" exam was graded incorrectly and that EVMS should not have expelled him. However plaintiff attempts to convolute the issues and argue that this suit involves new and separate requests giving rise to new and independent causes of action, it simply does not. This court, in Lewin III, considered exactly those allegations currently before the court, relying on exactly the same legal theory, and held that FERPA does not provide an avenue for students to substantively challenge academic evaluations. To hold that plaintiff could state a new cause of action by merely alleging that defendants did the same thing again and again would allow plaintiff to perpetuate these frivolous claims ad infinitum. Accordingly, plaintiff's § 1983 claims are clearly barred by the doctrine of claim preclusion.

Similarly, although plaintiff's 42 U.S.C. § 1985 and common law civil conspiracy claims rely on different legal authority than plaintiff's FERPA based § 1983 claims, these conspiracy claims are, at their core, the same claims as those decided in Lewin III, simply raised under different legal

authority. Plaintiff's legal maneuvering does not, however, preclude this court from looking beneath the surface:

> Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the premise or ground is related to the same transaction or series of transactions.

Paragon Services, 843 F. Supp. at 1079 (quoting Restatement (Second) of Judgments § 25, comment d (1982)); see also Winchester Homes, Inc. v. Osmose Wood Preserving, Inc., 37 F.3d 1053, 1058 (4th Cir. 1994) (" '[C]ause of action' is defined . . . as 'a set of operative facts which, under substantive law might give rise to a right of action.' ") (citation omitted); Smith v. Consolidated Coal Co., 7 F. Supp. 2d 751, 756 (W.D. Va. 1998) (" '[C]ause of action' is not defined by the identify of the statute pleaded.").

In support of his § 1985 claims and his state law civil conspiracy claim, plaintiff alleges that defendants conspired to violate his rights under FERPA and to conceal their wrongdoing by defending against plaintiff's litigation and "withholding crucial proof." (Compl. ¶ 49), so they could prevail against plaintiff's litigation. The crucial proof that defendants withheld, not surprisingly, is again the 1991 "challenge" exam materials and an unabridged version of the SPC deliberations, and the alleged harm is the inability to prove that he should have passed the "challenge" exam and been permitted to complete matriculation at EVMS. The court in Lewin III considered and dismissed precisely these allegations. Plaintiff cannot revive the claims or circumvent the bar posed by the well-established doctrine of claim preclusion by simply pleading different legal authority for identical allegations.

Finally, even if plaintiff's attempt to reformulate his FERPA based claims could be said to present new causes of action, they are, at the very least, barred by the related doctrine of issue preclusion. In order to state a claim under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and Virginia's common law of civil conspiracy, plaintiff must state a cognizable injury. See, e.g., 42 U.S.C. § 1983 (Persons acting under color of state law violating an individual's rights secured by the Constitution or laws of the United States "shall be liable to the party injured.") (emphasis added); Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985) (To state a cognizable claim under 42 U.S.C. § 1985, a plaintiff must prove an "injury to the plaintiff as a consequence of an overt act committed by the defendants in connection with the conspiracy."); Gallop v. Sharp, 179 Va. 335, 338 (1942) ("No cause of action [for civil conspiracy] exists without the resulting injury, and the damage produced must arise as the effective result of the conspiracy."). The injury that plaintiff allegedly sustained as a result of defendants withholding the materials he had requested is "injur[y] to his property interest in his cause of action." (Compl. ¶ 51). While in theory, damage to plaintiff's cause of action could state a cognizable injury, see Malley-Duff & Ass'n v. Crown Life Ins. Co., 792 F.2d 341, 355 (3d Cir. 1986), this court conclusively determined that plaintiff did not have a legally protected right to bring a substantive challenge to defendants' evaluation of his academic performance and that his inability to do so was not a legally compensable injury. See Lewin, 931 F. Supp. at 446. No amount of evidence that plaintiff might have discovered to discredit defendants' academic evaluation of his performance could have entitled him to relief. As this court his previously held, "such inquiry is [simply] beyond the scope of permissible judicial intervention." Lewin, 931 F. Supp. at 446. Accordingly, even if plaintiff's newly configured FERPA based claims could be characterized as new and independent causes of action, the issue of plaintiff's injury has been conclusively resolved in prior litigation between the parties, entitling defendants to judgment as a matter of law.

B. Insufficiency of Conspiracy Allegations

Although all of plaintiff's claims are clearly barred by the doctrine of res judicata, it is not entirely evident from defendant's motion for summary judgment whether defendants actually assert res judicata as a grounds for dismissal of plaintiff's conspiracy claims.[6] Courts have certainly recognized that a court, on notice that it has previously decided the issue presented, may raise res judicata sua sponte.[7] See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231 (1995); Disimone v. Browner, 121 F.3d 1262, 1267 (9th Cir. 1997); In re Medomak Canning, 922 F.2d 895, 904 (1st Cir. 1990); Nagle v. Lee, 807 F.2d 435, 438-39 (5th Cir. 1988). However, in the interests of justice, this court hesitates to grant summary judgment strictly on the basis of res judicata without assurance that plaintiff received notice and an opportunity to respond to this specific basis for the dismissal of his conspiracy claims. Accordingly, the court, in an abundance of caution, will proceed to the merits of defendants' alternative, clearly articulated grounds for dismissal of plaintiff's conspiracy claims, each of which presents an independent basis for rejecting these claims. First, defendants argue that both the § 1985 and state law conspiracy claims raised by plaintiff are barred by the doctrine of intracorporate immunity. Moreover, defendants argue that

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[6]Defendants in their initial brief, specifically referred to res judicata only in reference to plaintiff's § 1983 claims. However, defendants' reply brief, to which plaintiff has subsequently responded with a rebuttal brief, clearly states that "all of Plaintiff's claims are barred in as much as the instant lawsuit is nothing more than an attempt to revive claims which have been previously decided against Plaintiff." (Def. Reply Br. Mot. Dismiss / Summ. J. at 6.)

[7]This result avoids unnecessary judicial waste in furtherance of an essential policy underlying re judicata. See, e.g. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971).

plaintiff's § 1985 claims, even if not otherwise barred, simply fail to allege a viable cause of action under existing precedent.

1. Intracorporate Immunity

The doctrine of intracorporate immunity recognizes that a conspiracy, by definition, requires two or more persons and that, because a corporation and its agents comprise a single legal entity, they are legally incapable of conspiracy. See, e.g., Bank Realty, Inc. v. Practical Management Tech., Inc., 1991 U.S. App. LEXIS 11793 at *11-12 (4th Cir. 1991) (unpublished); Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974); Girard v. 94th St. & 5th Ave. Corp., 530 F.2d 66, 70 (2nd Cir. 1976), cert. denied, 425 U.S. 974 (1978); Bowman v. State Bank of Keysville, 229 Va. 534, 540-41 (1985) (recognizing intracorporate immunity doctrine under state law). That is, an alleged conspiracy between an employer and its employees acting within the scope of their employment, is "a conspiracy of one, a legal impossibility." Douty v. Irwin Mortg. Corp., 70 F. Supp. 2d 626, 632 (E.D. Va. 1999). Plaintiff, by suing EVMS and its employees for defending litigation premised upon academic decisions rendered by EVMS employees in the course of their employment, has alleged just such a legal impossibility.

Plaintiff attempts to circumvent this rule by arguing that because he has sued the defendants in their individual capacities, these defendants have developed independent personal stakes in defending this lawsuit and should now be excepted from the doctrine of intracorporate immunity. The Fourth Circuit has held to the contrary that "the immunity granted under the doctrine to the agents and the corporation [is not] destroyed because the agents are sued individually. 'Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation.' Buschi, 775 F.2d at 1252. In the case at bar, all defendants are represented by the same counsel, and

the objections to discovery that form the basis of this suit were entered by counsel on behalf of all defendants jointly. To adopt plaintiff's reasoning and hold that a joint response to a lawsuit filed against EVMS and its employees for official actions undertaken on behalf of the medical school removes defendants from the umbrella of intracoporate immunity would be to eviscerate the doctrine. Obviously, this court declines to do so.

2. Prima Facie Case Under 42 U.S.C. §1985

Finally, it is clear under existing precedent that, even if plaintiff's federal conspiracy claims were not barred by res judicata and the doctrine of intracorporate immunity, plaintiff's allegations of conspiracy simply fail to state a viable claim under 42 U.S.C. § 1985. Pursuant to 42 U.S.C. § 1985, a cause of action exists where two or more persons conspire to interfere with an individual's civil rights. Plaintiff's complaint appears to raise claims under both § 1985(2) for conspiracy to obstruct justice and § 1985(3) for conspiracy to discriminate based upon class based animus. Conspiracy to obstruct justice under § 1985(2) occurs when "[t]wo or more persons conspire to injure [a] party or witness in his person or property" in retaliation for that party or witness testifying in any court of the United States. 42 U.S.C. § 1985(2). Conspiracy to discriminate under § 1985(3) requires proof of:

> (1) [a] conspiracy of two or more persons, who are motivated by a specific class-based, invidiously discriminatory animus, to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Bushi, 775 F.2d at 1257. The Fourth Circuit has held that "to prove a section 1985 'conspiracy,' a claimant must show an agreement or a 'meeting of the minds' by defendants to violate

the claimant's constitutional rights." Simmons v. Poe, 47 F.3d 1370, 1377 (4th Cir. 1995). "Because of the high threshold that a Plaintiff must meet to establish a prima facie case under section 1985, courts often grant motions of dismissal." Davis v. Hudgins, 896 F. Supp. 561, 571 (E.D. Va. 1995). The Fourth Circuit has "specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts." Simmons, 47 F.3d at 1377.

In support of his § 1985(2) claim, plaintiff has made general conclusory allegations that defendants conspired to retaliate against him for his deposition testimony by delaying response to, or otherwise objecting to, plaintiff's request for production of certain discovery materials, but plaintiff has failed to provide any specific evidence of such a conspiracy. Moreover, it is exceedingly difficult to conceive of defendants' reluctance to divulge documents relevant to the "challenge" exam or refusal to produce the unabridged SPC recording as retaliation for deposition testimony when, in fact, defendants have expressed their unwillingness to produce these materials from the outset. Given that plaintiff's original complaint in Lewin I alleged defendants' unwillingness to timely produce precisely these documents, plaintiff's allegation that this unwillingness became retaliation, simply because he has subsequently given deposition testimony, is untenable.

Alternatively, plaintiff alleges that defendants conspired to retaliate against him, in violation of § 1985 (3), for belonging to a "class of students who challenge academic authority by trying to enforce student rights." (Compl. ¶ 57). It is well established in the Fourth Circuit, however, that "whistleblowers," academic or otherwise, simply do not qualify as a class entitled to § 1985 (3) protection. See Buschi, 775 F.2d at 1257-58. Accordingly, plaintiff's federal conspiracy claims, even if not barred by res judicata, fail to state a claim on which relief may be granted.

IV. Sanctions

In reviewing the motions presently before the court, the court became increasingly concerned that, in filing this latest lawsuit, plaintiff evinced a deliberate disregard of prior holdings from this court and was filing redundant, vexatious litigation with the sole intent to further harass defendants. Accordingly, the court, from the bench during the March 14, 2000, hearing on these motions, informed plaintiff that sanctions would be considered, setting forth the basis for sanctions, and ordering both parties to file appropriate memoranda and supporting documentation on this issue. Both parties have so filed.[8]

Federal Rule of Civil Procedure 11(b) provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, the attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,--
>
> (1) [a document presented to the court] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . .

Rule 11 provides that "[i]f, after notice and a reasonable opportunity to respond" the court determines that a violation

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[8]Plaintiff, in fact, filed two memoranda of law on this issue–an initial response to the court's order and a rebuttal brief, responding to the allegations set forth in defendants' memorandum of law.

has occurred, the court may "impose an appropriate sanction upon the attorneys, law firms, or parties" that have committed the violation or are responsible for the violation. Fed. R. Civ. P. 11(c).

An inquiry into a party's conduct under Rule 11 is guided by an objective standard of reasonableness and an assessment of the party's subjective intent. See Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060 (4th Cir. 1986). "[T]he inquiry focuses on whether a reasonable attorney in like circumstances could believe his actions to factually and legally justified." Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); see also Artco Corp. v. Lynnhaven Dry Storage Marina, Inc., 898 F.2d 953, 956 (4th Cir. 1990). "An improper may be shown by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings." Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte, 141 F.3d 1434, 1448 (11th Cir. 1998); see also St. Amant v. Bernard, 859 F.2d 379, 348 (5th Cir. 1988) (Repeat litigation of identical claims over identical subject matter may support an inference that the litigation was meant to harass opposing parties."). A party violates the requirement that pleadings be well-grounded in law if the complaint "has absolutely no chance of success under the existing precedent." Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991).

In the case at bar, it is apparent that plaintiff's claims are wholly frivolous, having no chance of success under clearly stated precedent. All of claims set forth in this suit are substantively identical to those which have previously been dismissed on the merits by this court, and plaintiff's conspiracy claims fail on their face, under well-established principles of law, to allege a claim on which relief can be granted.

Although, ordinarily, monetary sanctions may be not be awarded against a represented party for filing a legally frivolous claim, see Fed. R. Civ. P. 11(c), the circumstances of this case

are exceptional in that plaintiff is an attorney, having received a Juris Doctor degree from New York University School of Law and been admitted to the New York State Bar. (Lewin Dep. June 6, 1996 at 21). Moreover, plaintiff was not a passive participant in the filing of these legally frivolous claims. To the contrary, plaintiff directly assisted his counsel with legal research, drafting pleadings, and the preparation of other court documents. (Lewin Dep. Sept. 27, 1999, at 123-24).

Furthermore, these claims are not only frivolous, but, when considered in light of the history of litigation between these parties, plaintiff's claims are indicative of an improper purpose to harass defendants and further plaintiff's ongoing quest for revenge. Without sanctions, this court is gravely concerned that plaintiff will continue to clog the dockets of this court and the state court and continue to manipulate the judicial system to execute his own improper purposes. Indeed, plaintiff testified under oath that he is no longer able to engage in fruitful employment, as he considers suing defendants to be a full-time job. (Lewin Dep. Sept. 27, 1999, at 92-94, 119, 120-24, 131-34). Accordingly, the court finds that sanctions must be imposed against Mr. Lewin for advocating this latest frivolous lawsuit in this court.

In calculating the amount of sanctions to be imposed, the court must bear in mind the purpose of Rule 11: "compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets, and facilitating court management." In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990). The amount of monetary sanction, however, should always reflect the primary purpose of Rule 11 - - deterrence of future litigation abuse. See id. at 522-23. The Fourth Circuit has provided four factors for the district court to consider in determining an appropriate sanction: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum sanction needed to deter future frivolous filings; (3) the party's ability to

pay; and (4) the severity of the party's Rule 11 violation. See id.

In order for the court to determine an appropriate sanction for plaintiff's Rule 11 violations, the court **ORDERS** plaintiff to submit a statement of financial condition within thirty (30) days of the date of this Opinion, which statement the Clerk is **DIRECTED** to file under seal. Defendants may respond under seal within fifteen (15) days of service of plaintiff's financial statement upon them. Defendants are **ORDERED** to submit an itemized statement of their attorney's fees and costs incurred in connection with this lawsuit within thirty (30) days of this Opinion, to which plaintiff may respond within fifteen (15) days of service of this statement upon him. The court further **ORDERS** that plaintiff shall, hereafter, be prohibited from filing any new action in this court without first filing a certification, under penalty of perjury, that the complaint presents a new claim never before adjudicated in any court and that such claim is neither frivolous nor intended to harass. See, e.g., Brock v. Angelone, 105 F.3d 952, 954 (4th Cir. 1997) recognizing that a pre-filing injunction may be an appropriate sanction to deter further frivolous litigation).

V. Conclusion

For the reasons set forth above, plaintiff's motion to remand is **DENIED**, and defendants' motion to dismiss or, in the alternative, for summary judgment is **GRANTED**. As the court finds that plaintiff's claims are wholly frivolous and part of an ongoing campaign to harass defendants, the court **SANCTIONS** plaintiff, pursuant to Federal Rule of Civil Procedures 11, pending a determination of plaintiff's financial status and the reasonable attorney's fees and costs incurred by defendants in this lawsuit. Moreover, the court imposes a pre-filing certification on plaintiff for future lawsuits in this court, as set forth above.

The Clerk is **DIRECTED** to send a copy of this Opinion to counsel for both parties and the Clerk of the Circuit Court of the City of Norfolk, Virginia.

It is **ORDERED**.

Rebecca Beach Smith
United States District Judge

Norfolk, Virginia
April 28, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JUDGMENT IN A CIVIL CASE
Civil Case Number: 299cv2117

JONATHAN LEWIN,

Plaintiff,

v.

WILLIAM J. COOKE, et al.,

Defendants.

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decisions by Court.** This action came to decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's motion to remand is DENIED; that defendants' motion to dismiss or, in the alternative, for summary judgment is GRANTED; that plaintiff is SANCTIONED pursuant to Federal Rules of Civil Procedure 11, pending a determination of plaintiff's financial status and the reasonable attorney's fees and costs incurred by defendants in this lawsuit; and imposing a pre-filing certification on plaintiff for future lawsuits in this court.

April 28, 2000 [Filed May 1, 2000]
DATE

NORMAN H. MEYER, JR., CLERK

By: Delores S. Mason, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JONATHAN LEWIN,

Plaintiff,

v. **CIVIL NO. 2:99cv2117**

WILLIAM J. COOKE,
CLINTON H. TOEWE, II,
JAMES E. ETHERIDGE, JR.,
ROBERT M. MCCOMBS,
JAMES F. LIND,
THOMAS J. MANSER, and
MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a EASTERN VIRGINIA MEDICAL SCHOOL OF THE MEDICAL COLLEGE OF HAMPTON ROADS,

Defendants.

OPINION AND FINAL ORDER

The present matter is properly before the court on plaintiff's motion for reconsideration of this court's April 28, 2000, opinion, pursuant to Fed. R. Civ. P. 60 (b), and for a final determination of monetary sanctions in this case. For the reasons set forth below, the court **DENIES** Plaintiff's motion for reconsideration and **SANCTIONS** plaintiff $5,000 to be paid into the court.

I. Factual and Procedural History

On October 8, 1999, in the Circuit Court for the City of Norfolk, plaintiff filed his sixth complaint against defendants

seeking to challenge his failure of a 1991 pharmacology examination and the subsequent decision of Eastern Virginia Medical College to dismiss him from the medical school. Although plaintiff never served process in this sixth suit, defendants learned that the suit had been filed and promptly removed it to this court. Upon removal, defendants moved to dismiss or, in the alternative, for summary judgment. Plaintiff, requesting an extension of time to respond to defendants' motion, moved to remand all proceedings to the Norfolk Circuit Court. The parties came before the court for a hearing on these motions on March 14, 2000. The court took both motions under advisement, but allowed plaintiff additional time to respond to defendants' motion to dismiss or, in the alternative for summary judgment. During the hearing, the court also warned plaintiff that Fed. R. Civ. P. 11 sanctions would be considered, setting forth the basis for such sanctions, and ordering both parties to file memoranda of law and necessary supporting documentation on this issue.

Both parties filed appropriate memoranda and supporting documentation with the court, and on April 28, 2000, after carefully considering all submissions of the parties, the court issued an opinion denying plaintiff's motion to remand this case to the Circuit Court of the City of Norfolk; granting defendants' motion to dismiss, or in the alternative, for summary judgment; and finding that plaintiff, in filing this latest lawsuit in a barrage of lawsuits over the past seven years against defendants, had violated the strictures of Rule 11, as the suit was both frivolous and interposed for the improper purpose of harassing defendants. Accordingly, the court issued a partial sanction for plaintiff's Rule 11 violation in the form of a pre-filing injunction and indicated that an appropriate monetary sanction would follow. The court reserved judgment, however, on the amount of the penalty, pending the parties' filing of certain information to assist in calculating the appropriate sanction. Both parties subsequently filed the appropriate documentation.

On May 30, 2000, plaintiff filed with the court several additional documents, relating to the April 28, 2000, opinion, including: a notice of appeal to the Court of Appeals for the Fourth Circuit; a motion requesting the court to direct the Clerk not to certify the record as complete for appeal; a "preview" motion for reconsideration of any attorney's fee award that the court may intend to impose in the final determination of monetary sanctions, pursuant to Fed. R. Civ. P. 59 (e); and a motion for reconsideration of the decision actually rendered in the opinion, pursuant to Fed. R. Civ. P. 60 (b). For the reasons set forth below, the court finds that neither the motion to direct the Clerk to withhold certification of the record for appeal nor plaintiff's "preview" motion for reconsideration of anticipated attorney's fees is properly raised before the court at this time.

First, with respect to the motion requesting the court to direct the Clerk not to certify the record as complete for appeal, the court merely notes that the timeliness of a notice of appeal is a matter to be determined by the Court of Appeals for the Fourth Circuit. Although this court retains jurisdiction over the final determination of monetary sanctions, see Thornton v. General Motors Corp., 136 F. 3d 450, 453 (5th Cir. 1998), and the Rule 60 (b) motion for reconsideration, see Fobian v. Storage Technology Corp., 164 F. 3d 887, 888 (4th Cir. 1999), plaintiff's notice of appeal divests this court of jurisdiction with regard to all aspects of the case properly involved in the appeal. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) ("the filing of a notice of appeal is an event of jurisdictional significance . . . and divests the district court of its control over those aspects of the case involved in the appeal."). Thus, the Clerk of court will proceed as necessary to effectuate plaintiff's notice.

Second, plaintiff's "preview" motion for reconsideration of anticipated attorney's fees is both premature, as it predates any final determination of monetary sanctions, and mooted by the final determination of sanctions set forth herein. Although

the court, in theory, has authority to award attorney's fees, pursuant to its inherent power, see Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991), the court declines to do so. In its order to respond to sanctions issued from the bench at the March 14, 2000, hearing, the court did not notify plaintiff that sanctions would be considered pursuant to the court's inherent authority. The court cautioned plaintiff only that Rule 11 sanctions would be considered. Thus, in abundance of caution for plaintiff's due process rights, the court limits its sanctions to those authorized under by [sic] Rule 11and awards no attorney's fees in this case. See Fed. R. Civ. P. 11 (c) (2) (Only 'if imposed on motion and warranted for effective deterrence," may an order directing payment to the movant of attorney's fees be issued.) (emphasis added); Nuwestra v. Merrill, Fenner & Smith, Inc., 174 F. 3d 87, 92 (2d [sic]1999) (holding that attorney's fees may only be awarded under Rule 11 where proceedings initiated on motion of opposing party).[1] Accordingly, plaintiff's "preview" motion is both inappropriate and unnecessary.

As the court declines to consider either of the foregoing motions, only the Rule 60 (b) motion for reconsideration of the April 28, 2000, opinion and the final determination of sanctions properly remain before the court. All parties have submitted the appropriate memoranda and supporting documentation, and both matters are ripe for decision.

II. Discussion

A. Rule 60 (b) Motion for Reconsideration

Rule 60(b) provides that "o[n] motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding"

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[1]Defendants did not file a motion for a Rule 11 sanctions in this case. See infra note 2 and accompanying text.

where the judgment or order resulted from "mistake, inadvertence, surprise, or excusable neglect." Plaintiff predicates his motion for reconsideration on the first ground; that the court's opinion resulted from legal error. Specifically, plaintiff challenges that portion of opinion imposing sanctions against him, alleging that: (1) the court lacked authority to impose sanctions absent a formal motion by defendants or a written show cause order; (2) the court lacked authority to impose a pre-filing injunction or a personal monetary penalty without warning plaintiff that these particular sanctions might be imposed; (3) the court lacked authority to impose a monetary penalty on a represented party for legally frivolous claims; and (4) the court erred in its substantive determination that plaintiff's conduct was sanctionable. As set forth below, the court rejects each of plaintiff's arguments and finds no error that merits reconsideration of the April 28, 2000, opinion.

1. The Court Lacked Authority to Impose Sanctions Absent a Formal Motion by Defendants or a Written Show Cause Order

First, plaintiff challenges the sanctions imposed against him on the basis that they were initiated without adherence to the proper procedure and its attendant due process guarantees. Rule 11 (c) (1), which sets forth the appropriate procedure to be followed in initiating sanctions proceedings, provides that such proceedings may be initiated either on motion by the opposing party or by the court sua sponte. In both instances, the rule prescribes certain formalities designed to afford the party to be sanctioned due process of law. For instance, where sanctions are initiated on motion of a party, Rule 11 (c) (1) (A) provides that the moving party must serve the party against whom sanctions are sought with a copy of the motion, setting forth the specific conduct alleged to violate the rule, and allow the offending party twenty-one days to withdraw the challenged claims or contentions before filing the motion with the court. If the sanctionable claims or contentions are not withdrawn

within the twenty-one day period, the motion may be filed with the court, and the charged party shall have an opportunity to respond and defend the allegations set forth therein. See Fed. R. Civ. P. 11(c). Alternatively, Rule 11 (c) (1) (B) allows the court to commence sanctions proceedings on its own initiative, without affording the offending party a twenty-one day safe harbor period, provided that the court issues an order, describing the specific conduct that appears to violate the rule and directing the offending party to show cause why it has not violated the rule. As set forth in the advisory committee notes, the essence of these provisions is to "provide[] the person with notice and an opportunity to respond" to the allegations against him. Fed. R. Civ. P. 11 advisory committee's notes to 1993 amendments.

Plaintiff argues that because, in the case at bar, defendants did not file a motion for sanctions and follow the attendant procedures set forth above, and because the court did not issue a written show cause order, he was denied the requisite notice and opportunity to respond under the rule. Plaintiff is correct that defendants did not file a motion for sanctions[2] and were, in fact, barred from so moving until

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[2]Defendants did, in their brief in response to plaintiff's motion to remand, include one sentence informally requesting the court to consider sanctions and a footnote notifying the court of plaintiff's legal training and extensive participation in assisting his counsel in litigating his various suits against defendants. The court referred to defendants' request during the hearing, and, in fact, used the terms "request" and "motion" interchangeably at times, admittedly engendering some confusion regarding the procedural posture of the sanctions issue. Nonetheless, as plaintiff correctly notes there was no motion for sanctions before the court. Accordingly, to the extent that plaintiff argues that the absence of compliance with the procedure to initiating sanctions on motion of a party somehow precludes the imposition of sanctions in this case, the court merely notes that the existence of defendants' informal request for sanctions in no way affected the court's authority to raise plaintiff's apparent Rule 11 violations on its own initiative, based upon its own independent evaluation of the pleadings and record in this case.

plaintiff appeared at and advocated his claims in federal court. See Buster v. Greisen, 104 F. 3d 1186 (4th Cir. 1997) (holding that claims filed in state court are not sanctionable under Rule 11 upon removal until the plaintiff advocates those claims in federal court). Plaintiff is also correct in his assertion that the court must issue a show cause order before it sua sponte imposes Rule 11 sanctions. However, Rule 11 (c) (1) (B), while requiring the court to issue an order to show cause setting forth the specific conduct which the court deems sanctionable and permitting the charged party a reasonable opportunity to respond to the allegations, contains no requirement that the court's order be written.

Accordingly, the court, in the case at bar, afforded plaintiff all process due under the law in its order to show cause issued from the bench at the March 14, 2000, hearing in this case. The court clearly articulated on the record the specific conduct that it viewed as potentially sanctionable, including both the legally frivolous nature of the suit and the apparent improper purpose for which it was filed. The court set forth the specific bases for its concern that the claim was legally frivolous and filed for an improper purpose, questioning whether this new suit was merely an attempt to relitigate matters previously decided against plaintiff in a 1997 case against defendants in this court:

> I don't prejudge it. I don't know yet. But I was disturbed when I picked up this file--it took me a minute. I kept thinking, you know, I know this case, I know this case, and suddenly I realized I did know this case, I had it a few years back.
>
> . . .
>
> [I]f he is taking it as a mission of his life to just keep after these people after courts have ruled, that is not a proper lawsuit.
>
> . . .

> I will go back and look at it and compare them. I haven't decided yet whether it is different. But it just-- it has a familiar tone to it.

(Tr. March 14, 2000 hearing at 48-49, 53).

Likewise, the court informed plaintiff of the specific bases for its concern regarding plaintiff's improper motive in filing this suit, referring both to plaintiff's manipulation of the statute of limitations in order to potentially extend his litigation against defendants indefinitely and plaintiff's prior testimony under oath that he was no longer able to work as he considered suing the defendants to be a full-time job:

> This court is simply not going to put up with [plaintiff] trying to make end runs around the statute of limitations and so forth by just filing a lawsuit and letting it sit for a year over in state court and never serving it and never doing anything, and then using what is, in the court's opinion, an abused procedure . . . [I]f this is just the same suit with a different heading, it just isn't going to play in this court.

(Tr. March 14, 2000 Hr'g at 41).

> I have got an individual here who has been filing lawsuits now for five or six years. It is the second lawsuit in this court. There comes a point when a court- - as [defense counsel] has indicated, lawsuits are not for personal therapy or for revenge or harassment. They are to redress legal wrongs.
>
> And they are serious matters, and that's why Rule 11 is there. That tells a court, even if the attorneys don't move for sanctions, the court has a role to society and other litigants to see that it is not burdened down with frivolous lawsuits. This is a very busy court. It is even hard now in our court with the case load and the

> reduced judgeships to even get a hearing on a motion like this. You just can't clog a court with your own personal grievances if they don't have legal merit, and you can't play games with the system.
>
> If he is under oath saying that this has become his occupation, to just sue and harass these people, A, and B, if he is a lawyer and knows the law. . . if these are facts and matters, the court has to take them into consideration. Mr. Lewin may well be crossing the line with this lawsuit.

(Tr. March 14, 2000 Hr'g at 48-49).

Then, after informing plaintiff of the specific bases upon which sanctions were being considered, the court gave plaintiff one week to file a brief opposing sanctions and permitted both a response from defendants and a reply from plaintiff. (Tr. March 14, 2000 Hr'g at 54-55).

Notably, although plaintiff contends that the absence of a written show cause order denied him notice and an opportunity to respond, plaintiff, in fact, responded to the court's order with two memoranda of law opposing sanctions and voluminous supporting documentation, addressing every basis upon which sanctions were considered and ultimately imposed. Plaintiff extensively argued the legal merit of his claims, including the implications of res judicata, and he attempted to explain his own statements regarding his dedication to suing the defendants. The court fully considered plaintiff's arguments and the complete record in this case before rendering its final decision to impose Rule 11 sanctions. Thus, the court rejects plaintiff's attempt to import a writing requirement into Rule 11 (c) (2) and finds, both as a matter of law and as a matter of fact, the plaintiff received all procedural protections due under Rule 11 (c) in the initiation of sanctions proceedings against him.

2. The Court Lacked Authority to Impose Sanctions Without Warning of the Precise Form of Sanctions Under Consideration

Second, plaintiff argues that the substance of the court's notice was legally inadequate as he was not warned of the precise form of the sanctions under consideration. Specifically, plaintiff argues that the court erred in penalizing him personally with a monetary sanction and in imposing a pre-filing injunction upon him without specifically warning him that such sanctions could issue. Plaintiff's argument is flawed in two respects. As an initial matter, contrary to plaintiff's assertions, this court did provide plaintiff with specific notice that it was considering sanctioning him personally for his bad faith conduct. (Tr. March 14, 2000 Hr'g at 47). In fact, in addressing the possibility of sanctions, neither the court nor the parties, at any point, intimated that plaintiff's counsel would be sanctioned for his participation in this lawsuit. Rather, the record reflects that the court's concern was directed exclusively to plaintiff's personal history of litigation against defendants, plaintiff's status as an attorney and his personal participation in filing this lawsuit, and plaintiff's motivation in pursuing this litigation. (Tr. March 14, 2000 Hr'g at 41-42; 45-53).

Moreover, Rule 11 does not require additional notice of the precise form of the sanctions that could be imposed. To the contrary, the rule provides that, so long as the charged party is given particularized notice of the conduct the court deems sanctionable and is given adequate opportunity to respond to the allegations against him, the court may use its discretion in fashioning the appropriate sanction, including injunctive and/or monetary penalties. See Fed. R. Civ. P. 11(c) (1) and (2). Plaintiff argues that because the Third Circuit has required notice of the particular form of sanctions to be imposed, this court was, likewise, bound to do so. See Simmerman v. Corino, 27 F. 3d 58, 64 (3d Cir. 1994). However, given the plain language of Rule 11, it appears that the Third Circuit's

imposition of such a requirement is an additional protection afforded by that circuit that is not specifically required by the language of the rule, nor mandated by the law of this circuit. Indeed, no court outside the Third Circuit has required advance notice of the form of sanctions under consideration. Rather, most courts have held that notice of the specific conduct deemed sanctionable and an opportunity to defend against those allegations fully satisfies procedural due process. See e.g., Ted Lapidus, S.A.v.Vann, 112 F.3d 91 (2d Cir. 1997); Thornton, 136 F. 3d at 453; In re Cohen v. Fox, 122 F. 3d 1060, 1997 WL 577583 (4th Cir. Sept. 17, 1997).[3] Plaintiff, in the case at bar, received the requisite notice under this precedent and the plain language of Rule 11. Moreover, the court, in initiating sanctions proceedings specifically invoked Rule 11, with its attendant consequences, which include both injunctive and monetary penalties, thus providing ample notice to plaintiff of the form of sanctions that could be imposed in this case. Accordingly, the court declines to reconsider either the monetary penalty or the pre-filing injunction imposed in this case.

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[3]Notably, prior to the amendment of 18 U.S.C. § 1915 to include the provision barring further litigation by an prisoner who, on three or more prior occasions while incarcerated, had an action dismissed as frivolous, see 18 U.S.C. § 1915 (g), courts frequently imposed pre-filing injunctions to prevent abusive prisoner litigation without providing any notice to plaintiffs or opportunity to respond. See, e.g., Williams v. Fleming, 30 F. 3d 132, 1994 WL 399552 at *2 (4th Cir. Aug. 3, 1994): Tucker v. Seiber, 17 F. 3d 1434, 1994 WL 66037 at *2 (4th Cir. March 2, 1994). Although the Fourth Circuit vacated such orders for lack of due process, the court did so on the basis that the frivolous litigant had been given no notice or opportunity to respond, not due to an absence of specificity regarding the form of the sanction. See id.

3. The Court Lacked Authority to Impose a Monetary Penalty on a Represented Party for Legally Frivolous Claims

Plaintiff, in his third allegation of error, argues that the court exceeded its authority by imposing a monetary penalty upon him for filing a legally frivolous claim in light of his representation of counsel. As set forth in the April 28, 2000, opinion, although the court concurs with plaintiff that Rule 11 (c) (2) (A) prohibits imposition of a monetary penalty upon a represented party for filing a legally frivolous claim, that rule is not dispositive in this case. First, plaintiff is an attorney trained in the law, and although represented by counsel, plaintiff utilized that training to participate directly in the preparation of his litigation against defendants.[4] His invocation of the protections ordinarily afforded to represented parties, in recognition of the fact that such parties typically lack the knowledge or training necessary to evaluate the legal sufficiency of their claims, is, therefore, disingenuous.

Second, and most importantly, however, the court's decision to sanction plaintiff was not premised solely on the frivolity of his claims. The court also specifically found that plaintiff had acted in bad faith, filing this sixth lawsuit against defendants with the improper purpose of furthering his own campaign of harassment in retaliation against defendants. Rule 11 imposes no limitations on the court's authority to impose a monetary penalty on a party as a sanction for filing litigation in bad faith and with an improper purpose to harass.

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[4]The court observed plaintiff's substantial assistance in the presentation of his claims during March 14, 2000, hearing as plaintiff pulled caselaw from his files and appeared to be passing both cases and notes to his counsel to assist him during oral argument on purely legal issues.

4. The Court Erred in its Substantive Determination that Plaintiff's Conduct Was Sanctionable

Finally, plaintiff argues that the court erred in concluding that plaintiff's conduct was sanctionable, maintaining that his claims were merited in law and imposed for the proper purpose of vindicating his legal rights. The court fully articulated its rationale in imposing sanctions in the April 28, 2000, opinion. Plaintiff has raised no new arguments that warrant reconsideration of that reasoning.[5] As the court finds no error in either the procedure underlying the Rule 11 proceeding in this case or the substance of the decision to sanction plaintiff, the court proceeds to a final determination of monetary sanctions.

B. Monetary Sanctions

As set forth in the April 28, 2000, opinion, the amount of monetary sanction must always reflect the primary purpose of Rule 11--deterrence of future litigation abuse. See In re Kunstler, 914 F.2d 505, 552 (4th Cir. 1990). The Fourth Circuit has provided four factors for the district court to consider in determining an appropriate sanction: (1) the reasonable attorney's fees incurred by the opposing party; (2) the minimum sanction needed to deter future frivolous filings; (3) the party's

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[5]Plaintiff does, however, attempt to deflect attention from his own deposition testimony regarding his tireless pursuit of defendants by proffering selected excerpts to suggest that his testimony extended no further than a statement that, for a limited period of time while proceeding pro se, he was forced to dedicate substantial amounts of time to defending himself against defendants' motion for sanctions in state court. Although plaintiff's deposition testimony was not dispositive in this case, it warrants mention that, contrary to plaintiff's arguments, his testimony, when read in full and in context, reveals that he, in fact, not pursued gainful employment for a number of years, as he considers his litigation against defendants to be a full-time job. (Lewin Dep. Sept. 27, 1999, at 92-94, 119, 120-124, 131-34.)

ability to pay; and (4) the severity of the party's Rule 11 violation. Taking into consideration each of these factors, the court finds that a substantial penalty is necessary in this case to effectuate the purposes of Rule 11.

Plaintiff has engaged in a long-standing campaign of harassment against defendants over the course of the past seven years, and has been undeterred in this campaign, despite previous threats and awards of sanctions for other instances of bad faith conduct in litigating these various matters. He has substantial financial resources that have allowed him to relentlessly pursue defendants and dedicate himself full-time to litigation of this frivolous dispute with defendants' evaluation of his academic performance.[6] Plaintiff has demonstrated that he is willing to incur tremendous expense in his pursuit of defendants.

Likewise, he has demonstrated that he is willing to impose significant expense on others in furtherance of his campaign. Plaintiff has, as set forth above, now filed six lawsuits against defendants with ongoing litigation spanning seven years. With respect to this most recent lawsuit, this court found that it was not interposed for a proper purpose, but rather in a wholly frivolous attempt to relitigate matters previously decided against plaintiff by this court in 1997. Nonetheless, in support of this frivolous suit, plaintiff filed voluminous legal memoranda and supporting documentation, costing defendants significant money to defend[7] and adding unnecessarily to the docket congestion of this court. Thus, taking into consideration the totality of the circumstances in this case and the purposes of

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[6]Plaintiff filed under seal with the court a statement of financial condition and a supplemental statement of financial condition on May 30, 2000, and June 2, 2000, respectively.

[7]Although the court declines to impose attorney's fees in this case, defendants have submitted attorney's fees in the amount of $43,176.23 incurred in defending this suit alone.

Rule 11, the court finds that a sanction of $5,000 is the minimum penalty necessary to deter future litigation abuses by plaintiff.

III. Conclusion

Accordingly, for the reasons set forth above, the court **DENIES** plaintiff's motion for reconsideration of the April 28, 2000, opinion, and **SANCTIONS** plaintiff in the amount of $5,000, to be due and payable in full within ten (10) days of the date of this order. This penalty shall be paid to the Clerk of Court United States District Court, 600 Granby Street, Norfolk, Virginia 23510.

The Clerk is **DIRECTED** to forward a copy of this opinion and final order to plaintiff, to counsel for all parties, and to the Clerk of the Court of Appeals for the Fourth Circuit.

It is so **ORDERED**.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 27, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JONATHAN LEWIN,

Plaintiff,

v. **CIVIL NO. 2:99cv2117**

WILLIAM J. COOKE,
CLINTON H. TOEWE, II,
JAMES E. ETHERIDGE, JR.,
ROBERT M. MCCOMBS,
JAMES F. LIND,
THOMAS J. MANSER, and
MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a EASTERN VIRGINIA MEDICAL SCHOOL OF THE MEDICAL COLLEGE OF HAMPTON ROADS,

Defendants.

Final Order

By opinion filed April 28, 2000, this court granted summary judgment in favor of all of the defendants on all of the claims against them and held that Fed. R. Civ. P. 11 sanctions were warranted by plaintiff's bad-faith, frivolous litigation against defendants. The court imposed a pre-filing injunction against plaintiff and withheld judgment on the appropriate monetary penalty, pending the parties filing certain information to assist the court in determining the appropriate amount for the penalty.

Plaintiff moved for reconsideration of that opinion. However, on June 27, 2000, the court issued an eighteen-page opinion and final order, declining to reconsider its prior ruling

and imposing a monetary sanction on plaintiff in the amount of $5,000.

On July 7, 2000, plaintiff filed a motion for reconsideration of the June 27, 2000, order. No new matters of any merit or substance have been raised by plaintiff's motion for reconsideration, and the court **DENIES** the motion. The court's previous rulings remain in full force and effect.

The Clerk is **DIRECTED** to forward a copy of this final order to plaintiff and counsel for defendants.

It is so **ORDERED**.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 10, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JONATHAN LEWIN,

Plaintiff,

v. **CIVIL NO. 2:99cv2117**

WILLIAM J. COOKE,
CLINTON H. TOEWE, II,
JAMES E. ETHERIDGE, JR.,
ROBERT M. MCCOMBS,
JAMES F. LIND,
THOMAS J. MANSER, and
MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a EASTERN VIRGINIA MEDICAL SCHOOL OF THE MEDICAL COLLEGE OF HAMPTON ROADS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the court on plaintiff Jonathan Lewin's Motion to Recuse the undersigned judge, pursuant to 28 U.S.C. § 455 (a), Federal Rule of Civil Procedure 60 (b), and due process; and Motion to File Supporting Brief with Pages in Excess of Local Rule, pursuant to Eastern District of Virginia Local Rule 7 (E) (3). For the reasons set forth below, the court **GRANTS** the Motion to receive the brief and **DENIES** the Motion to Recuse.

I. Factual and Procedural History

Plaintiff has a long and protracted history of litigation in this court,[1] dating back to March 24, 1995, and involving two separate lawsuits, each of which basically address the same claims, i.e., plaintiff's challenge to his failure of a 1991 pharmacology examination and the subsequent decision of Eastern Virginia Medical College to dismiss him from the medical school. For a complete history of this matter, the court adopts the recitation of factual and procedural history provided in two of its opinions in the litigation that has ensued between these parties. See Lewin v. Cooke, et al., No. 2:99cv2117 (E.D. Va. April 28, 2000, and June 27, 2000). Subsequently, on July 7, 2000, plaintiff filed a motion for reconsideration of the quantity of the monetary sanction imposed by the court in its June 27, 2000 Order, pursuant to Federal Rule of Civil Procedure 59(e) or 60 (b). The court denied plaintiff's motion, and plaintiff's sanction fee was paid on July 10, 2000. Thereafter, on July 11, 2000, defendants filed a Federal Rule of Civil Procedure 54(d) (2) Motion for Attorneys' Fees and Costs, pursuant to 42 U.S.C. § 1988 and Va. Code § 8.01-271.1, and plaintiff also filed a notice of appeal to the Court of Appeals for the Fourth Circuit of both the June 27, 2000 and July 10, 2000 orders. On July 24, 2000, plaintiff filed a response, and on July 26, 2000, defendants filed a reply. On October 13, 2000, the court ordered that defendants file additional information as to the reasonableness of the attorneys' fees requested by their counsel, and the "market rate" for such services. Thereafter, on October 27, 2000, defendants filed a supplemental memorandum and affidavits, pursuant to the court's October 13, 2000 order.

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[1]Plaintiff has also filed multiple lawsuits in the state courts addressing the same claims. On October 8, 1999, plaintiff filed his sixth complaint against defendants in the Circuit Court for the City of Norfolk. See Lewin v. Cooke, et al., No. 2:99cv2117 (E.D. Va. April 28, 2000, and June 28, 2000) (setting forth procedural history of plaintiff's lawsuits in this court and the state courts).

Subsequently, on October 30, 2000, plaintiff filed a Motion to File Supporting Brief with pages in Excess of Local Rule, pursuant to Eastern District of Virginia Local Rule 7 (E) (3), in anticipation of a Motion to Recuse U.S. District Court Judge Rebecca Beach Smith, pursuant to 28 U.S.C. § 455 (a), Federal Rule of Civil Procedure 60(b), and due process, which plaintiff filed on October 31, 2000.[2] Plaintiff also filed a Motion for Sanctions, pursuant to Federal Rule of Civil Procedure 11, on October 31, 2000. On November 13, 2000, defendants submitted a response to plaintiff's Motion to Recuse and a response to plaintiff's Motion for Sanctions.[3] Thereafter, on November 17, 2000, plaintiff filed rebuttal briefs in support of his Motion to Recuse and his Motion for Sanctions, as well as a Motion That His November 17, 2000 Filings Be Deemed Timely.[4] Accordingly, this matter is ripe for review.

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[2]Plaintiff has submitted a brief in support of his Motion to Recuse with pages in excess of the limit provided by the local rules. See E.D. Va. R. 7 (E)(3). The court exercises its discretion and considers plaintiff's submission in its entirety.

[3]Plaintiff's Motion for Sanctions will be addressed in a separate Memorandum Opinion and Order, as will Defendants' Motion for Attorneys' Fees and Costs.

[4]In the brief filed in support of his motion to deem the filings timely, plaintiff requests that the timeliness of his November 17, 2000 rebuttal briefs not be disputed because plaintiff's counsel did not receive defendants' opposition briefs until November 14, 2000, due to defendants' resort to regular mail as opposed to the overnight mail used to file with the court, and as evidenced by an affidavit supplied to this effect; and plaintiff filed the rebuttal briefs three days later in conformity with the local rules. P1's Br. Supp. Mot. that Nov. 17, 2000 filings be deemed timely (Nov. 17, 2000). The court has considered these submissions as timely.

II. Analysis of Motion to Recuse

This court recently set forth the standard for a disqualification motion made under § 455 (a),[5] which provides that "any justice, judge, or magistrate . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455 (a); see United States v. DeTemple, 162 F. 3d 279, 286 (4th Cir. 1998), cert. denied, 526 U.S. 1137 (1999) (discussing standard for recusal under § 455(a)). An objective standard is used to make this determination to promote both the actuality and the appearance of impartiality. See United States v. Carmichael, 726 F. 2d 158, 160 (4th Cir. 1984); Rice v. McKenzie, 581 F. 2d 1114, 1116 (4th Cir. 1978). The Fourth Circuit has clearly and long held that

> Alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L. Ed. 778 (1966). The nature of the bias must be personal rather than judicial. United States v. Carmichael, 726 F. 2d 158, 160 (4th Cir. 1984). On review, the question is whether the judge abused his discretion in denying a recusal motion. Id. And it is not an abuse of discretion if the complaint is merely based upon the judge's rulings in the instant case or related cases or attitude derived from his experience on the bench. Id. at 160-161.

Shaw v. Martin, 733 F. 2d 304, 308 (4th Cir. 1984); see also Liteky v. United States, 510 U.S. 540, 555 (1994) (holding that disqualification generally requires extra-judicial bias, which

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[5]See In re Computer Dynamics, No. 2:00cv556, 2000 U.S. Dist. LEXIS 15192 (E.D. Va. Oct. 13, 2000).

arises from events, proceedings, or experiences outside the courtroom). Recusal is not appropriate based simply on opinions formed based on facts introduced or events occurring during judicial proceedings, absent "a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555 (stating that "judicial remarks [made] during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge"); see In re Beard, 811 F. 2d 818, 827 (4th Cir. 1987) (holding that disqualification generally requires extra-judicial bias, which arises from events, proceedings, or experiences outside the courtroom); DeTemple, 162 F.3d at 287 (quoting In the Matter of Mason, 916 F. 2d 384, 386 (7th Cir. 1990) (indicating that "the probability that a judge will decide a case on a basis other than the merits must be more than 'trivial'"). Furthermore, judicial rulings alone almost never constitute a valid basis for a disqualification motion. See Liteky, 510 U.S. at 555; see also United States v. Parker, 742 F. 2d 127, 128-29 (4th Cir.), cert. denied, 469 U.S. 1076 (1984) (holding that recusal is unwarranted when premised on a judge's ruling on pretrial motions or presiding over parallel proceedings). Instead, as the Supreme Court has observed, judicial rulings "are proper grounds for appeal, not for recusal." Liteky, 510 U.S. at 555; see Tom v. Reno, No. 96-1820-A, 1997 U.S. Dist. LEXIS 21965, at *5-6 (E.D. Va. Mar. 11, 1997).

A judge must decide all cases that come before him to the best of his ability, see 28 U.S.C. § 453, and is only obliged to recuse himself when to do so would be appropriate under the legal standards set forth herein. See generally In re Virginia Elec. & Power Co., 539 F. 2d. 357, 369 (4th Cir. 1976) (indicating that a § 455 motion is ultimately subject to the discretion of the district judge). Finally, a party's subjective feelings, suspicions, and speculation do not support

disqualification.[6] See DeTemple, 162 F.3d at 287; Bradley v. School Bd. of City of Richmond, 324 F. Supp. 439, 448 (E.D. Va. 1971); see also United States v. Glick, 946 F. 2d 335, 336-37 (4th Cir. 1991) (recusal not required just because circuit judge served on Sentencing Commission, despite defendant's conjectures of bias).

Plaintiff's motion, premised on 28 U.S.C. § 455 (a), Federal Rule of Civil Procedure 60(b), and due process, and accompanied by a sixty-three (63) page brief, seeks recusal, prospectively regarding sanction and attorney fee motions, and retrospectively to vacate rulings and orders in this case. However, plaintiff's complaints all center on the undersigned judge's rulings in the case.[7] All of the undersigned judge's prior and current dealings with plaintiff have been in the context of

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[6]At one point, plaintiff even suggests recusal based on his speculation about the reasons this court provided the Norfolk Circuit Court with a copy of its April 28, 2000 Opinion. See Pl's Br. Supp. Mot. Recuse at 37-38 (Oct. 31, 2000). This court as denying a motion to remand this case to the Norfolk Circuit Court, of which decision the state circuit court would clearly need to be aware, since the case was originally filed in that court. Moreover, when an individual has a history of filing multiple lawsuits on the same issues in different courts, it is essential for one court to be aware of another court's rulings, and it is a matter of course to so send a copy of an opinion or order to the other court. This assertion of plaintiff for recusal is but another example of his frivolous claims.

[7]Plaintiff's challenges center on his continuing disagreement with this court's ruling that, for purposes of Federal Rule of Civil Procedure 11, an oral order of record from the bench to show cause is sufficient and a separate written order to show cause is not necessary; his belief that this court abused its discretion in continuing to exercise its discretion in retaining jurisdiction over the state law civil conspiracy claim in this case; his allegations that this court's failure to address each and every one of his arguments in its judicial rulings constitutes grounds for disqualification; the court's explanation to him at the March 14, 2000 hearing that "life is not always fair" constitutes bias against him; and this court's awarding of summary judgment in prior proceedings involving plaintiff prejudices the undersigned judge against him.

the judicial proceedings in this court. All opinions have been formed solely on the basis of facts introduced or events occurring in the course of the present and prior proceedings. Plaintiff's allegations alone do not constitute the extra-judicial bias required for disqualification under § 455 (a). His challenges to this court's judicial actions and rulings are therefore properly raised on appeal, rather than via a motion for recusal.[8]

III. Conclusion

For the reasons set forth above, the court **DENIES** plaintiff's Motion to Recuse, pursuant to 28 U.S.C. § 455 (a); and the derivative Motion for Relief, pursuant to Federal Rule of Civil Procedure 60 (b) (6), and due process.[9]

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[8]Notably, plaintiff has already availed himself of appeal, filed on May 30, 2000. Plaintiff at one point argues in his recusal motion that the court is delaying his appeal, yet he continues to file additional motions upon which the court must rule. Plaintiff is delaying his own appeal by the constant and lengthy filings with the court, often in excess of the rules. See Letter from Court to Counsel, Lewin v. Cooke, et al., No. 2:00cv2117 (dec. 8, 2000). However, a review of the file will show that the court has endeavored to thoroughly review and rule on each of plaintiff's filings as promptly as possible given their volume and the court's ongoing docket.

[9]Plaintiff's disqualification motion can also be denied on the basis of untimeliness, as recusal motions must be filed at the first opportunity after the matter claimed for disqualification arises. See Sine v. Local No. 992 Int'l Bhd. Of Teamsters, 882 F.2d 913, 915 (4th Cir. 1989) (pertaining to motion made under § 144); SSMC, Inc. v. Singer Furniture Acquisition Corp., No. 93-0952-R, 1994 U.S. Dist. LEXIS 19571, at *16-17 (W.D. Va. Dec. 7, 1994) (pertaining to motion made under § 144 and § 455). Moreover, litigants cannot wait to see whether they like a court's ruling before filing a disqualification motion. See United States v. Owens, 902 F. 2d 1154, 1156 (4th Cir. 1990); Sine, 882 F. 2d at 916; see also United States v. Pearson, 203 F. 3d 1243, 1276 (10th Cir. 2000), cert. denied, 120 S. Ct. 2734 (June 26, 2000) ("A promptly filed motion conserves judicial resources and alleviates the concern that it is motivated by adverse rulings or an attempt to manipulate the judicial process."); SSMC, No. 93-0952-R,

The Clerk is **DIRECTED** to mail a copy of this Memorandum Opinion and Order to counsel for the parties, and to the Clerk of the United States Court of Appeals for the Fourth Circuit.

It is so **ORDERED**.

/s/Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
January 5, 2001

1994 U.S. Dist. LEXIS 19571, at *17; In re Martin-Trigona, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("the right to an impartial jude cannot be advansed so broadly as to permit the parties to engage in 'judge-shopping' under the guise of a motion to recuse."); see also United States v. Sykes, 7 F. 3d 1331, 1339 (7th cir. 1993) (holding that motion made under § 144 waived after two months); United States v. Durrani, 835 F. 2d 410, 427 (2d Cir. 1987) (holding that motion made under § 144 waived after four months).

This case has been pending before the court since December 27, 1999, with the court being inundated by plaintiff's filings and with the court issuing continuous orders and rulings. The hearing referenced by plaintiff was held on March 14, 2000. Nevertheless, plaintiff waited until October 31, 2000 – over seven (7) months after the March 14, 2000 hearing – to file his Motion, and after all pending matters had been decided by the court, except one for attorneys' fees, which was ripe for decision at the time of the Motion to Recuse. See Letter from Court to Counsel, Lewin v. Cooke, et al., No. 2:99cv2117 (Dec. 8, 2000). Moreover, plaintiff had already filed an appeal on May 30, 2000. See supra note 8.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JONATHAN LEWIN,

Plaintiff,

v. **CIVIL NO. 2:99cv2117**

WILLIAM J. COOKE,
CLINTON H. TOEWE, II,
JAMES E. ETHERIDGE, JR.,
ROBERT M. MCCOMBS,
JAMES F. LIND,
THOMAS J. MANSER, and
MEDICAL COLLEGE OF HAMPTON ROADS, a/k/a EASTERN VIRGINIA MEDICAL SCHOOL OF THE MEDICAL COLLEGE OF HAMPTON ROADS,

Defendants.

OPINION AND ORDER

This matter is before the court on defendants' Motion for Attorneys' Fees and Costs, pursuant to 42 U.S.C. § 1988 and Va. Code § 8.01-271.1. For the reasons set forth below, the court **GRANTS** defendants' Motion and **AWARDS** defendants attorneys' fees and costs in the amount of $38,482.73 to be paid by plaintiff within ten (10) days of the date of this Opinion.

I. Factual and Procedural History

On December 27, 1999, Eastern Virginia Medical College, et al. [hereinafter referred to as "defendants"], filed a notice of removal from Norfolk Circuit Court in response to the filing of Jonathan Lewin's [hereinafter referred to as "plaintiff"] sixth complaint against defendants, challenging his failure of a 1991 pharmacology examination and the subsequent decision of Eastern Virginia Medical College to dismiss him from the medical school. Once the action was removed to federal court, defendants then filed a motion to dismiss or, in the alternative, for summary judgment on December 29, 1999. On January 10, 2000, plaintiff filed a motion to extend time to file a response to defendants' motion. Plaintiff then filed a motion to remand the case back to Norfolk Circuit Court on January 27, 2000. On March 14, 2000, a hearing was held on these motions, and the court took the matter under advisement, noting that plaintiff had until March 21, 2000, to supplement his response to defendants' motion to dismiss or, in the alternative, for summary judgment. During the hearing, the court also warned plaintiff that Federal Rule of Civil Procedure 11 sanctions would be considered, setting forth the basis for such sanctions, and ordering both parties to file memoranda of law and necessary supporting documentation on this issue.

On March 24, 2000, both parties submitted appropriate memoranda and supporting documents with the court, and on May 1, 2000, after carefully considering all of the parties' submissions, the court entered an order denying plaintiff's motion to remand; granting defendants' motion to dismiss or, in the alternative, for summary judgment; and finding that plaintiff had violated Rule 11 by the filing of a suit that was both frivolous and interposed for the improper purpose of harassing the defendants. Therefore, the court imposed a partial sanction

against plaintiff, pursuant to Rule 11, in the form of a pre-filing certification requirement and indicated that an appropriate monetary sanction would follow. However, the court reserved judgment on the amount of the penalty, pending the parties' filing of information requested by the court to assist in calculating the appropriate sanction. Both parties subsequently filed the appropriate documentation.

On May 30, 2000, plaintiff filed several additional documents with the court relating to the May 1, 2000 order, including: a statement of financial condition under seal; a notice of appeal to the Court of Appeals for the Fourth Circuit; a motion requesting the court to direct the Clerk not to certify the record as complete for appeal; a "preview" motion for reconsideration of any attorneys' fee award that the court intended to impose in the final determination of monetary sanctions; and a motion for reconsideration of the decision actually rendered in the opinion. Plaintiff filed a supplemental statement of financial condition on June 2, 2000. On June 27, 2000, the court entered an order denying plaintiff's motion for reconsideration and sanctioning plaintiff in the amount of $5000.00 to be due and payable in full within ten (10) days of the date of the order.

On July 7, 2000, plaintiff filed another motion, pursuant to Federal Rule of Civil Procedure 59(e) or 60 (b), for reconsideration of the quantity of the monetary sanction imposed by the court in its June 27, 2000 Order. The court denied plaintiff's motion, and plaintiff's sanction fee was paid on July 10, 2000. On July 11, 2000, defendants filed a Federal Rule of Civil Procedures 54(d)(2) Motion for Attorneys' Fees and Costs pursuant to 42 U.S.C. §1988 and Va. Code § 8.01-271.1, and plaintiff also filed a notice of appeal to the Court of Appeals for the Fourth Circuit of both the June 27, 2000 and

July 10, 2000 orders. On July 24, 2000, plaintiff filed a response to defendant's Motion for Attorneys' Fees and Costs, and on July 26, 2000, defendants filed a reply. On October 13, 2000, the court ordered that defendants file additional information as to the reasonableness of the attorneys' fees requested by their counsel, and the "market rate" for such services. Thereafter, on October 27, 2000, defendants filed a supplemental memorandum and affidavits, pursuant to the court's October 13, 2000 order. Accordingly, this matter is ripe for review.[1]

II. Analysis of Rule 54 (d) (2) Motion for Attorneys' Fees and Costs

The Federal Rules of Civil Procedure provide that a prevailing party is entitled to costs other than attorneys' fees "as of course. . . [e]xcept when express provision therefor is made either in a statute of the United States or in these rules.. . unless the court otherwise directs." Fed. R. Civ. P. 54 (d)(1). In addition, attorneys' fees may also be recovered, "by motion...

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[1]On October 31, 2000, four days after the Motion for Attorneys' Fees and Costs became ripe for review, and the court was prepared to rule thereon, plaintiff filed two new motions – one for sanctions against defendants and the other for the undersigned judge to recuse herself, with a sixty-three page supporting brief on the recusal motion. Plaintiff takes totally inconsistent positions in the Motion to Recuse, on the one hand arguing that the Motion for Attorneys' Fees and Costs should not be decided before the recusal motion and on the other hand arguing that the undersigned judge is delaying his appeal by not deciding the Motion for Attorneys' Fees and Costs. See P1's Br. Supp. Mot. Recuse at 1-2, 56-58 (Oct. 31, 2000); infra note 6. However, the Motion to Recuse did not mature until mid-November, 2000, at which time the undersigned judge had undergone two major surgeries and was recuperating therefrom. Accordingly, this Motion for Attorneys' Fees and Costs has been decided by the undersigned judge at the first instance after decision of the Motion to Recuse. See Letter from Court to Counsel, Lewin v. Cooke, et al., No. 2:99cv2117 (Dec. 8, 2000).

filed and served no later than 14 days after entry of judgment; . . . specify[ing] the judgment and the statute, rule, or other grounds entitling the moving party to the award; and . . . stat[ing] the amount or provid[ing] a fair estimate of the amount sought . . . [u]nless otherwise provided by statute or order of the court." Fed. R. Civ. P. 54 (d) (2) (A), (B).[2] Defendants seek an award of fees pursuant to 42 U.S.C. § 1988 and Va. Code § 8.01-271.1. Section 1988 gives the court the discretion to award reasonable attorneys' fees to a prevailing party "as part of the costs" in constitutional and civil rights litigation. 42 U.S.C. § 1988 (b). Similarly, the Virginia Code allows for the recovery of attorneys' fees '[i]f a pleading, motion, or other paper is signed or made in violation of [the certification requirement]." Va. Code § 8.01-271.1.

A. Bases for Recovery of Attorneys' Fees

1. Recovery of Attorneys' Fees Under 42 U.S.C. § 1988

Section 1988 provides for the recovery of attorneys' fees by the prevailing party in a suit brought under, among other

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[2]The normal limitations on claims for "fees and expenses" under Rule 54(d) do not apply when the basis for seeking such a sanction is a violation of the Federal Rules. Fed. R. Civ. P. 54(d)(2)(E); see Sakon v. Andreo, 119 F. 3d 109, 114 (2d Civ. 1997); United Indus. Inc. v. Simon-Hartley, Ltd., 91 F. 3d 762, 766 n. 9 (5th Cir. 1996); Gobbo Farms & Orchards v. Poole Chemical Co., Inc., 81 F. 3d 122, 123 (10th Cir. 1996); Gin v. Chicago Ins. Co., 106 F. 3d 407, 1997 WL 21207, at *2 (9th Cir. 1997); Schbley v. Gould, 1996 WL 363043; at *3 (D.Kan. 1996). However defendants do not seek "fees and expenses" as sanctions for a violation of these Rules.

Furthermore, although the court limited sanctions in its June 17, 2000 Opinion and Final order "to those authorized under by [sic] Rule 11 and awards no attorneys' fees in this case [because] [t]he court [had] cautioned plaintiff only that Rule 11 sanctions would be considered," Lewin v. Cooke, No. 2:99cv2117, slip op. At 4-5 (E.D. Va. June 27, 2000) [hereinafter referred to as Lewin B], rule 54 provides an independent basis for recovering attorneys' fees.

things, statutory provisions 42 U.S.C. § §1983 and 1985. However, the plaintiff's civil rights case must be "frivolous, unreasonable or groundless" in order to recover. Christianburg Garment Co. v. Equal Employment Opportunity Comm'n., 434 U.S. 412,422 (1978); see Hughes v. Rowe, 449 U.S. 5, 14 (1980); Carr v. Super 8 Motel Developers, Inc., 964 F. Supp. 1046, 1048-49 (E.D. Va. 1997). Likewise, an award of attorneys' fees to a prevailing defendant in a civil rights case will be upheld when a civil rights plaintiff continues to "prosecute despite numerous indicators of a meritless claim." Razzaq v. Old Dominion Univ., 1999 U.S. Dist. LEXIS 3024, at *4 (E.D. Va. Feb. 11, 1999) (applying an abuse of discretion standard in its analysis) (citing Arnold v. Burger King Corp., 719 F2d 63, 66-67 (4th Cir. 1983), cert. denied, 469 U.S. 826 (1984)); see Hux v. Hyatt Corp., 187 F. 3d 629, 1999 WL 427195 (4th Cir. June 25, 1999).

Although subjective bad faith is not required to justify an award of attorneys' fees under § 1988, see Christiansburg Garment, 434 U.S. at 422, it provides "an even stronger basis for [awarding] attorneys' fees incurred by the defense." Id.; see Hutchinson v. Staton, 994 F. 2d 1076, 1080 (4th Cir. 1993) (affirming the district court's application of the Christiansburg standard in awarding the prevailing defendant attorneys' fees under § 1988 because the plaintiffs' § 1983 claim "had no basis in fact" and "revenge" was the plaintiffs' underlying motive in bringing the civil rights lawsuit).

Similarly, this court criticized plaintiff's civil rights claims in two previous opinions as (1) "wholly frivolous"; (2) brought solely for the purpose of revenge and harassment; (3) asserted in bad faith; and (4) the attempted relitigation of matters already adjudicated. Lewin v. Cooke, 95 F. Supp. 2d 513 (E.D. Va. 2000)[hereinafter referred to as Lewin A]; Lewin v. Cooke, No. 2:99cv2117 (E.D. Va. June 27, 2000) [hereinafter referred to as Lewin B]. Plaintiff's behavior clearly satisfies the standard set forth in Christianburg. Such serial

litigation misconduct cannot be tolerated. Therefore, § 1988 supports the awarding of sanctions against plaintiff in the form of attorneys' fees as to both the §§ 1983 and 1985 claims.

2. Recovery of Attorneys' Fees Under State Law Civil Conspiracy

Although 42 U.S.C. § 1988 does not provide a basis for defendants to recover their attorneys' fees for prevailing against a plaintiff's frivolous state law civil conspiracy claim, defendants instead may rely upon Va. Code § 8.01-271.1 for recovery. Under § 8.01-271.1, the court sua sponte or upon motion of a party "shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee." Va. Code § 8.01-271.1 (emphasis added). This section may be applied to a complaint initially filed in state court and subsequently removed to federal court. See Alfaro v. Thomson McKinnon Securities, Inc., 1989 U.S. Dist. LEXIS 18065, at * 10 (E.D. Va. Feb. 22, 1989). Furthermore, it allows a court to impose sanctions against a plaintiff for failure to file a complaint in good faith. Va. Code § 8.01-271.1; see Trident Perfusion Assocs., Inc. v. Lesnoff, 121 F.3d 700, 1997 WL 528321, at *2-3 (4th Cir. Aug. 28, 1997) (indicating that a determination of whether a complaint is filed in good faith is governed by an "objective standard of reasonableness"); County of Prince William v. Rau, 239 Va. 616, 391 S.E. 2d 290, 292 (1990). "Good faith" is shown when, if "after reasonable inquiry," the plaintiff could have formed a reasonable belief that his lawsuit "was warranted by existing law," whereas a claim brought "in bad faith" is one which "had no chance at success under existing law." Tullidge v. Board of Supervisors, 239 Va. 611, 391 S.E. 2d. 288, 290 (1990). Therefore, based on the court's finding of plaintiff's bad faith in filing a frivolous state law civil conspiracy

claim, either the plaintiff, his attorney, or both may be sanctioned for a violation of Va. Code § 8.01-271.1.

B. Timeliness of Rule 54 Motion

Rule 54 provides that a request for attorneys' fees is timely[3] if made by motion, filed, and served "no later than 14 days after entry of judgment." Fed. R. Civ. P. 54 (d)(2)(B); see Fed. R. Civ. P. 54 (d) (2) advisory committee notes, 1993 amendments (indicating that prompt filing "enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case"). However, the word "judgment," as used in this context, is broadly construed to include "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54 (a) (emphasis added).[4]

Furthermore, even if defendants' filing was found to be untimely as the result of an apparent misinterpretation of the statute's filing requirements, Federal Rule of Civil Procedure 6 (b) provides district courts with the discretion to extend the time limit established in Rule 54 (d) (2). See Mary M. v. North

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[3]Failure to file a "timely" motion acts as a waiver of attorneys' fees. See Logue v. Dore, 103 F. 3d 1040, 1047 (1st Cir. 1997); Simon-Hartley, 91 F. 3d at 766; see also Allen v. Murph, 194 F. 3d 722, 724 (6th Cir. 1999) (affirming the district court's finding that an attorney's carelessness in allowing the 14-day period to expire was inexcusable); Zaklama v. Mount Sanai Med. Ctr., 906 F. 2d 645, 649 (11th Cir. 1990) (holding that the attorneys' failure to file for attorneys' fees within the time limits prescribed by the local rules made the motion for fees untimely). To allow otherwise would prevent finality because an adverse party would be subject to the potential for substantial fee liability. See Woods Constr. Co. v. Atlas chem. Indus., Inc., 337 F. 2d 888, 891 (10th Cir. 1964).

[4]The word "any" enjoys a broad construction. See Mapoy v. Carroll, 185 F. 3d 224, 229 (4th Cir. 1999); United States v. Atkins, 872 F. 2d 94 (4th Cir. 1989); see also Barseback Kraft AB v. United States, 121 F. 3d 1475, 1481 (Fed. Cir. 1997).

Lawrence Community School Corp.., 174 F.R.D. 419, 422-23 (S.D. Ind. 1997) (basing an extension of time on "excusable neglect" for the failure to timely file a motion for attorneys' fees).[5] In determining whether a party's failure to comply with court rules should be excused, a court should look to:

> [A]ll relevent circumstances surrounding the party's omission . . . includ[ing] . . . the danger of prejudice [to the opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in food faith.

Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395 (1993); see 44 Liquormart, Inc. v. State of Rhode Island, 940 F. Supp. 437, 400-42 (D.R.I. 1996) (applying the analysis in Pioneer and finding that lack of notice of entitlement to attorneys' fees and changes in law firm staff resulting in loss of the First Circuit's amended mandate was insufficient to excuse plaintiff's failure to comply with Rule 54's filing deadline). The court's discretion is generally limited to extending time limits when specifically requested and explicitly premised on excusable neglect. See Barghout v.Bureau of Kosher Meat & Food Control, 141 F.3d 1157, 1998 WL 193106, at *2-3 (4th Cir. Apr. 23, 1998) (holding that Rule 6 (b) "did not authorize the district court to extend the time to petition for attorneys' fees in the award order [because] [n]o enlargement of time or request therefor was made during the 14-day period following judgment . . . nor . . . has [either attorney] taken the position that the failure to timely file the attorneys' fee requests was attributable to excusable neglect"). Judicial discretion recognizes "' the need for flexibility and good

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[5]Contrary to plaintiff's contention, the granting of a motion to amend under Rule 59 is not the only way to extend the time period for filing a fee petition under Rule 54(d)(2).

sense in interpreting time limits on attorney's fee petitions,'" as well as "discretion regarding whether or not to enforce those time limits." Mary M., 174 F.R.D. at 423 n.2 (citation omitted).

This construction of Rule 54 (d) is also supported by the purpose of its fourteen-day provision "to assure that the opposing party is informed of the claim before the time for appeal has elapsed." Thomas v. Board of Educ., Unified School Dist. No. 501, 177 F.R.D. 488, 490 n.4 (D. Kan. 1997); 44 Liquormart, 940 F. Supp. 437. Furthermore, it promotes fairness for the losing party, improves judicial efficiency, and prevents stale fee petitions. Fed. R. Civ. P. 54 (d) (2) advisory committee notes, 1993 amendments (citations omitted); see Avitia v. Metropolitan Club of Chicago, Inc., 156 F.R.D. 654, 656 (N.D. Ill. 1994). Additionally, prompt filing facilitates the district court's fee ruling in time to allow appellate review at the same time as a review on the merits. See Fobian v. Storage Technology Corp., 164 F. 3d 887, 890 (4th Cir. 1999).

On July 11, 2000, defendants filed a Rule 54 (d) (2) Motion for Attorneys' Fees and Costs on the fourteenth day after the court entered its Opinion and Final Order denying plaintiff's motion for reconsideration and setting sanctions on this basis in the amount of $5,000.00 as " the minimum penalty necessary to deter future litigation abuses by plaintiff." Lewin B, at 17. Prior to the entry of this judgment, the court granted defendants' motion to dismiss or, in the alternative, for summary judgment. Although the court sanctioned plaintiff under Rule 11 in its May 1, 2000 order, it did not quantify the amount of sanctions it intended to impose. Instead, the court specifically reserved jurisdiction to quantify the Rule 11 sanctions and permitted both parties to provide information relevant to plaintiff's financial status and defendants' reasonable attorneys' fees and costs to assist the court in its determination. Only after the parties provided the supplemental financial information did the court fix the amount of Rule 11 sanctions at

$5,000.00, as evidenced in its Opinion and Final Order of June 27, 2000. See Lewin B.

The court's quantification of sanctions in its June 27, 2000 judgment was integral to defendants' decision to seek recourse against plaintiff to recover attorneys' fees and costs expended in defending against plaintiff's frivolous claims. Further, it is clearly a final order from which an appeal would lie.[6] It thereby meets the fourteen-day filing requirement imposed by Rule 54.[7] The § 1988 motion also satisfied Rule 54's timing requirements. See DeBauche v. Virginia Commonwealth Univ., 7 F. Supp. 2d 718, 725 (E.D. Va. 1998), aff'd in part, rev'd in part on other grounds, DeBauche v. Trani, 191 F. 3d 499 (4th Cir. 1999), cert. denied, 120 S.Ct. 1451 (2000). Accordingly, defendants' motion is timely, and to the extent it is not, the circumstances set forth herein justify why an extension from the May 1, 2000 order is appropriate.[8]

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[6]Plaintiff filed a notice of appeal on July 11, 2000 from, among other orders, the court's June 27, 2000 Opinion and Final Order. The Deputy Clerk for the United States Court of Appeals for the Fourth Circuit, Taline Akseraylian, indicated in correspondence to the parties that although plaintiff's appeal was docketed, the matter would not proceed until the district court clerk forwarded a copy of the district court's order disposing of defendants' Rule 54(d)(2) Motion for Attorneys' Fees and Costs. Further, the Deputy Clerk of the Court of Appeals directed the parties' attorneys to inform her office in writing of this court's resolution of the Rule 54(d)(2) motion and whether either party intended to file an "amended notice of appeal" from the district court's post-judgment Order. As evidenced by this letter, any appeal from this court's disposition of the Rule 54(d)(2) Motion for Attorneys' Fees and Costs will be consolidated with plaintiff's two earlier appeals for purposes of argument and briefing.

[7]Even if defendants' motion did not meet the fourteen-day filing requirement, an extension of time for filing could stil lbe permised on "excusable neglect" under Rule 6(b) and Pioneer Inv. Services Co., 507 U.S. at 395. See supra at 10-11.

[8]See supra note 7.

C. Jurisdiction to Adjudicate Rule 54 (d) (2) Motion for Attorneys' Fees

In order to be appealable, a "final decision" on the merits must be made, ending "the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945); see Bernstein by Bernstein v. Menard, 728 F. 2d 252, 253 (4th Cir. 1984). Although the filing of a notice of appeal generally divests the district court of jurisdiction, see Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, reh'g denied, 471 U.S. 1062 (1985); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); see also Lewin B, at 4, the district court retains jurisdiction when a motion is made raising issues collateral to the main cause of action. See White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 451-52 (1982) (stating that "a request for attorney's fees under § 1988 raises legal issues collateral to" and " separate from the decision on the merits"); Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F. 2d 1327, 1330-31 (4th Cir.), cert. denied, 484 U.S. 829 (1987) (holding that jurisdiction over a Rule 11 motion for attorneys' fees remains with the district court even after a notice of appeal is filed); MIE Maryland Executive Park Gen. Partnership v. LaSalle Nat'l Bank, 215 F. 3d 1320, 2000 WL 665645, at *3 (4th Cir. May 22, 2000) (stating that "the district court retained jurisdiction to consider the [defendants'] motion [for attorneys' fees] regardless of the fact that the case on the merits had already been appealed . . . because . . . the motion raised issues collateral to the main cause of action"); Carr 964 F. Supp. at 1047-48 n.2 (E.D. Va. 1997) (basing its analysis on Langham-Hill and retaining jurisdiction over defendants' motion for attorneys' fees under 42 U.S.C. § 1988, even after several plaintiffs had filed a notice of appeal).[9]

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[9]The district court also retains jurisdiction over matters, "in aid of appeal." In re Grand Jury Proceedings, 947 F. 2d 1188, 1190 (4th Circ.

Although a decision on the merits may be "final" and "appealable" prior to the entry of a fee award, the remaining fee issue is generally "collateral" to the decision on the merits. See White, 455 U.S. at 452 n. 14 (citations omitted); Bernstein, 728 F. 2d at 253; see also Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988) (holding that a decision on the merits is a "final decision" for purposes of § 1291 regardless of whether a request for attorneys' fees attributable to the case remains for adjudication). Clearly, the collateral character of attorneys' fees establishes that an outstanding fee question does not bar recognition of a judgment on the merits as "final" and "appealable." White, 455 U.S. at 452 n.14 (citing Obin v. District No. 9, Int'l Ass'n of Machinists & Aerospace Workers, 651 F. 2d 574, 584 (8th Cir. 1981); see Budinich, 486 U.S. at 200 (reiterating that it is "indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain").

Although plaintiff's appeal divested the district court of jurisdiction over the issue of frivolousness, this court retains jurisdiction over the collateral issue of attorneys' fees raised by defendants in their Rule 54 (d) (2) motion. Thus, despite plaintiff's filing of a notice of appeal, the district court retains jurisdiction over defendants' motion because it is collateral to the main cause of action.

1991); see Fobian v. Storage Technology Corp., 164 F. 3d 887, 890 (4th Cir. 1999) (applying Grand Jury Proceedings and holding that the district court is in the best position to deny a Rule 60(b) motion on the basis of frivolousness "without disturbing appellate jurisdiction over the underlying judgment"). Not only does a swift denial facilitate the consolidation of an appeal from that denial with the underlying appeal, but it also "preserves judicial resources and eliminates unnecessary expense and delay, and therefore is surely in 'aid of the appeal.'" Id. (citations omitted). By analogy, the district court is also in the best position to assess the appropriateness of awarding attorneys' fees under Rule 5(d)(2) because such an award is merely collateral to the underlying judgment and does not interfere with appellate jurisdiction.

D. Reasonableness of Attorneys' Fees and Costs

Defendants seek an award of attorneys' fees and costs in the amount of $43,537.73, which they claim is a reasonable and "fair estimate" of their efforts expended, as of May 1, 2000, in defending against plaintiff's "longstanding campaign of serial litigation-based harassment and vengeance against . . . [d]efendants." Def's Mot. for Attorney's Fees and Costs [hereinafter "Def's Mot. for Fees"] at 3, ¶ 13; 2, ¶ 5. An assessment of fees must be reasonable.[10] In calculating a reasonable fee under 42 U.S.C. § 1988, a court must start by multiplying the number of hours reasonably spent on litigation times a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S.424, 433 (1983).

A determination of both the reasonable hourly rate and the reasonable number of hours expended requires separate consideration for each individual billing hours to the client. David K. Sutelan, a partner in the Norfolk, Virginia office of the

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[10]Resonableness is evaluates on the basis of:

> (1) the time and labor required to litigate the suit; (1) the novelty and difficulty of the questions presented by the lawsuit; (3) the skill required to perform the legal service; (4) the preclusion of other employment opportunities for the attorney due to the attorney's acceptance of the case; (5) the customary fee for such services; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount in controversy involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) awards in similar cases.

Trimper v. City of Norfolk, 58 F. 3d 68, 73 (4th Cir.), cert. denied, 516 U.S. 997 (1995) (citing Daly v. Hill, 790 F. 2d 1071, 1975 n. 2 (4th Cir. 1986), and using the factors employed by the Fifth Circuit in its lodestar analysis in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 717-19 (5th Cir. 1974).

law firm of Mays & Valentine, L.L.P., and Jonathan B. Sprague, a partner in the Philadelphia, Pennsylvania office of the law firm of Post and Schell, P.C., submitted affidavits and itemized billing statements representing the reasonable expenses they incurred in their representation of defendants. See Def's Mot. for Fees, Exs. A, B. Two additional Post and Schell attorneys, A. James Johnston and Mark L. Mattioloi [sic], are listed on the itemized billing statements submitted by defendants. See id., Ex. B. Christian J. Connell, an associate, and Karen Sarkissian, a paralegal, also worked on this matter for defendants, and their hours are specified in the billing statements. See id., Exs. A, B. As long as it is the accepted practice of the attorney and the community to bill the client for the hourly work of non-attorney employees, then reasonable hourly charges to the client for those individuals are properly included as part of the attorney's fee award. See Missouri v. Jenkins, 491 U.S. 274, 284 (1989).

The party seeking fees must also establish the reasonableness of the requested hourly rate. See Blum v. Stenson, 465 U.S. 886, 895-96 n. 11 (1984). The market rate will generally guide the fee inquiry. See id. Therefore, in order to assist the court in its determination of the market rate, "[i]n addition to the attorney's own affidavits, the fee applicant must produce satisfactory 'specific evidence of the "prevailing market rates in the relevant community" for the type of work for which he seeks an award.'" Plyler v. Evatt, 902 F. 2d 273, 277 (4th Cir. 1990) (quoting Spell v. McDaniel, 824 F. 2d 1380, 1402 (4th Cir. 1987) (quoting Blum, 465 U.S. at 895-96 n.11). Defendants' attorneys have submitted detailed, itemized billing statements, as well as their own affidavits. A supplemental memorandum and additional affidavits from Mr. Johnson and Mr. Sutelan, as well as affidavits from three other practitioners in the Norfolk area, were also filed, evidencing that the rates requested are within the "market rate." See Supp. Mem. Def. (Oct. 27, 2000). Furthermore, in addition to considering materials submitted by the parties, the court may also, on its

own initiative, review the billing statements for reasonableness. See Spell v. McDaniel, 616 F. Supp. 1069, 1085 (E.D.N.C. 1985), aff'd in part, vacated in part, on other grounds, 824 F. 2d 1380 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988). Accordingly, the court will consider the factors promulgated in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714, 717-19 (5th Cir. 1974), and adopted by the Fourth Circuit in conducting its analysis.[11]

1. Amount of Fees

(1) Time and Labor Expended

According to the affidavits that defendants have submitted to the court, their attorneys collectively spent in the vicinity of 280 hours on this case spanning a seven-month period. Notably, Mr. Sprague spent twenty-seven (27) hours conducting legal research and drafting defendants' motion to dismiss, in addition to forty (40) hours drafting the accompanying brief. See Def's Mot. for Fees, Ex. A. Moreover, Mr. Mattioli spent nearly eleven (11) hours drafting a response for extension, as well as seventeen (17) hours drafting a response to plaintiff's petition for remand. See id., Ex. B. Although the time spent on other items included in defendants' attorneys' billing statements appears reasonable, the time spent preparing the aforementioned documents seems excessive. The court must exclude hours from the lodestar calculation that are not reasonably expended, and attorneys are expected to "exclude from a fee request hours that are excessive, redundant or otherwise unnecessary." Hensley, 461 U.S. at 434. Therefore, the court finds that the hours billed for these matters should be reduced by one-third.

[11] See supra note 10.

(2) Novelty and Difficulty of Questions Raised

The preparation of a motion to dismiss or, in the alternative, for summary judgment may be a novel or difficult task, depending upon the issues and the factual and legal circumstances of the case. In this case, plaintiff presents such lengthy, numerous, repetitive issues that to respond thereto presents increased difficulty.

(3) Skill Required to Properly Perform Legal Services Rendered

It clearly takes an experienced attorney to deal with this protracted litigation.

(4) Attorney's Opportunity Costs

The court has been made aware of no opportunities defendants' attorneys declined because of this case. However, the lengthy nature of this litigation, with the voluminous filings, would support a finding of reasonableness of the fees requested.

(5) Customary Fee For Like Work

Defendants' attorneys claim an hourly rate between $145.00 to $160.00, depending on the attorney. They also claim an hourly rate of $110.00 per hour for the work performed by Mr. Connell, and an hourly rate of $65.00 for Ms. Sarkissian's paralegal assistance in this matter.

Moreover, pursuant to this court's October 13, 2000 order, defendants' attorneys have produced additional "specific evidence of the 'prevailing market rates in the relevant community' for the type work for which [they] seek [ ] an award." Plyler, 902 F. 2d at 277; see Supp. Mem. Def. (Oct. 27, 2000). A review of defendants' attorneys [sic] supplemental memorandum and affidavits indicates that the rates requested

are well within the "market rate" in the Norfolk, Virginia, legal community. See id. Furthermore, defendants' attorneys [sic] rates have been substantially discounted for the representation of this matter. See id., Ex. A, ¶ 6; Ex.B, ¶ 4.

(6) Attorney's Expectations at Outset of Litigation

At the outset of the litigation, defendants' attorneys filed a motion to dismiss or, in the alternative, for summary judgment. Attorneys' fees and costs were only subsequently sought by defendants after the court declined to make such an award in its final determination of monetary sactions. See Lewin B, at 17 n.7.

(7) Time Limitations Imposed by Client or Circumstances

The court has not been made aware of any unusual time limitations in this case.

(8) Amount in Controversy and Results Obtained

The defendants' attorneys prevailed on their motion to dismiss or in the alternative for summary judgment, thereby avoiding further protracted litigation at this time and exposure to plaintiff's claims for damages. In his Motion for Judgment, initially filed in Norfolk Circuit Court and then removed to this court, plaintiff sought monetary relief in the amount of $10,000,000.00 for compensatory and consequential damages against defendants, jointly and severally; and $350,000.00 for punitive damages against defendants, jointly and severally; as well as his attorney's fees and costs; and any additional relief deemed appropriate by the court. See Mot. for J., Lewin v. Cooke, et al., L99-2448, at 25 (Oct.8, 1999). Consequently, the defendants' attorneys have achieved successful results on alleged "high dollar" claims.

(9) Experience, Reputation, and Ability of Attorney

The court is familiar professionally with the experience, reputation, and ability of the attorneys and the law firm of Mays & Valentine, L.L.P., both of which enjoy the highest regard of the local legal community. The court is not familiar with the experience and reputation of the attorneys and the Philadelphia law firm of Post & Schell, P.C.; but the court is familiar with their ability from the previous lawsuit in this court between the same parties on basically the same issue in 1995, in which attorneys from Post & Schell and Mays & Valentine performed with exceptional legal ability. Moreover, the court finds that the attorneys from both firms possess remarkable patience and perseverance in defending this case now and in 1995.

(10) Undesirability of Case

The harassing nature and frivolity of plaintiff's case, as well as its duration, clearly make defending against it undesirable.

(11) Nature and Length of Professional Relationship Between Attorney and Client

This factor weighs in favor of defendants' attorneys' fees due to the length of the ongoing litigation and the numerous state and federal lawsuits by plaintiff against these defendants and the continued representation of these defendants by these same law firms and attorneys, at least since 1995 in this court.

(12) Awards in Similar Cases

The potential for recovery of attorneys' fees by the prevailing party in a suit brought under 42 U.S.C. § § 1983 and 1985 is well-documented. See supra at 6-7. Moreover, Va. Code § 8.01-271.1 also provides a well-grounded basis for

awarding attorneys' fees. See supra 8-9. Fee awards under § 1988 were never intended to " 'produce windfalls to attorneys.'" Riverside v. Rivera, 477 U.S. 561, 580 (1986). However, attorneys' fees may be awarded when incurred in defending against frivolous civil rights and state law civil conspiracy claims.

Considering all of the factors enumerated above, the court finds that the fees requested by defendants' attorneys are reasonable. Therefore, the court **AWARDS** defendants attorneys' fees in the amount of $36,509.50.

2. Amount of Costs

In determining an award of attorneys' fees, [l]itigation expenses, such as supplemental secretarial costs, copying, telephone costs and necessary travel are integrally related to the work of the attorney . . ." and, thus are compensable. Daly, 790 F. 2d at 1083 (holding such costs compensable in 42 U.S.C. § 1988 action) (quoting Wheeler v. Durham City Bd. Of Educ., 585 F. 2d 618, 623-24 (4th Cir. 1978) (holding such costs compensable in 20 U.S.C. § 1617 action).

Defendants request reimbursement for such litigation expenses. Specifically, the billing statement from Mays and Valentine reflects $1,334.73 in costs for automated research service charges, duplicating, filing, long-distance, local delivery, secretarial overtime, and printing/binding. Def's Mot. for Fees, Ex. A. Although it does not specify costs, the billing statement submitted by Post and Schell includes round-trip airfare from Philadelphia to Norfolk and a hotel room, in the amount of $638.50. See id., Ex. B. Plaintiff has not made any objections to the inclusion of these charges. Therefore, the court finds that all items taxed as costs were reasonably necessary and related to the presentation of the case. Accordingly, the court reviews defendant's statement of costs and finds the items contained

therein to be reasonable. Therefore, the court **AWARDS** defendants costs in the amount of $1,973.23.

III. Conclusion

For the reasons set forth above, the court **GRANTS** defendants' Rule 54 (d) (2) Motion for Attorneys' Fees and Costs, pursuant to 42 U.S.C. § 1988 and Va. Code § 8.01-271.1. In their Motion, defendants asserted that, as of May 1, 2000, $43,537.73 is a "fair estimate" of the reasonable attorneys' fees and costs they seek to recover from plaintiff. Further, defendants reserved the right to file supplemental attorneys' fee affidavits once the additional time and fees are calculated for the preparation and filing of a responsive opposition brief to plaintiff's July 7, 2000 Motion for Reconsideration. Accordingly, in light of the Johnson analysis conducted herein, the court **AWARDS** defendants attorneys' fees and costs in the amount of $38,482.73,[12] payable within ten (10) days of the date of this Opinion. If not so paid within the ten-day period, post-judgment interest will begin to run.

The Clerk is **DIRECTED** to mail a copy of this Opinion and Order to counsel for the parties, and to the Clerk of the Court of Appeals for the Fourth Circuit.

It is so **ORDERED**.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
January 8, 2001

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[12]The court has already reviewed plaintiff's statement of financial condition, as well as supplemental statement of financial condition, respectively filed under seal with the court on May 30, 2000, and June 2, 2000, in response to its April 28, 2000 order, see Lewin A, 95 F. Supp. 2d at 527, and finds that plaintiff possesses the ability to pay these fees. See Lewin B, No. 2:99cv2117, at 16-17 & n. 6.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JONATHAN LEWIN

Plaintiff,

v. ACTION NO. 2:99cv2117

WILLIAM J. COOKE, et al

Defendants.

JUDGMENT

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court**. This action came to decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the court hereby awards defendants attorney's fees and costs in the amount of $38,482.73, payable within ten (10) days of the date of this judgment. If not so paid within ten-day period, post-judgment interest will begin to run. IT IS FURTHER ORDERED, that plaintiff's Motion for Sanctions is hereby DENIED.

January 8, 2001 [Filed February 6, 2001]
Date

NORMAN H. MEYER, JR. CLERK

By: Sandra L. Shaw, Deputy Clerk

FIFTH AMENDMENT
OF THE UNITED STATES CONSTITUTION

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

FOURTEENTH AMENDMENT
OF THE UNITED STATES CONSTITUTION

Sec. 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

20 U.S.C. Section 1232g
Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions .

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

. . .

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations

of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which–

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

. . .

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

. . .

28 U.S.C. Section 455
Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

42 U.S.C. Section 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1985
Conspiracy to interfere with civil rights

. . .

(2) Obstructing justice; intimidating party, witness, or juror.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; . . .

(3) Depriving persons of rights or privileges.

If two or more persons in any State of Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or

property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Fed. R. Civ. P. 6
Time

. . .

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except to the extent and under the conditions stated in them.

. . .

Fed. R. Civ. P. 11
Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not by verified or accompanied by affidavit. And unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.* (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with

respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rule 26 through 37.

Fed. R. Civ. P. 54
Judgments; Costs

. . .

(d) Costs; Attorneys' Fees. *(1) Costs Other than Attorneys' Fees.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) *Attorneys' Fees.* (A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

. . .

Fourth Circuit Local Rule 36(c)
Citation of Unpublished dispositions

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

RECORD NO. 00-1732(L)
CONS./W 00-1943, 01-1165, 01-1335

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,
Plaintiff-Appellant,

v.

WILLIAM J. COOKE, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

PETITION FOR REHEARING EN BANC

Richard J. Conrod, Sr.
RICHARD J. CONROD, SR., P.C.
Suite 201
522 S. Independence Blvd.
Virginia Beach, VA 23452
(757) 456-0883

Counsel for Appellant

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*/ Appellant has filed twenty copies of a Motion to supplement this Petition with two pages that are attached to that Motion. This Petition's "Conclusion" is section "IX" because the two supplemental pages contain section "VIII", titled: "SANCTIONS BECAUSE THE PANEL REVERSES THIS COURT'S PRECEDENT.

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3/21/00 BRIEF: "Memorandum of Law Supporting Plaintiff's Motion to Consolidate Two Briefs, and for Rebuttal Pleading to Defendants' Brief on Sanctions, and for Hearing on Sanctions Thereafter"
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I. STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

1. UNIFORMITY OF DECISIONS

En banc rehearing is sought because the panel decision conflicts with precedent of this Court and the Supreme Court:

Adickes v. S. H. Kress and Company, 398 U.S. 144 (1970)
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)
Armstrong v. Manzo, 380 U.S. 545 (1965)
Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)
Carey v. Piphus, 435 U.S. 247 (1978)
Czosek v. O'Mara, 397 U.S. 25 (1970)
Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)
Marks v. United States, 430 U.S. 188 (1977)
Pavelic & LeFlore v. Marvel Entertainment, 439 U.S. 120 (1989)
Seigert v. Gilley, 500 U.S. 226 (1991)
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991)
Suarez Corp. Industries v. McGraw, 125 F.3d 222 (4th Cir. 1997)
Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770 (4th Cir. 1991)

Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.

2. EXCEPTIONAL IMPORTANCE

This Petition presents a question of exceptional importance:

Does intracorporated immunity protect obstruction of justice, contrary to McAndrew v. Lockheed Martin Corp., 206 F.3d 1031 (11th Cir. 2000)?

II. SANCTIONS BECAUSE THE PANEL DENIES A STATUTE'S PLAIN WORDS.

Subsection (a)(1)(A) of the Family Educational Rights and Privacy Act ["FERPA"], 20 U.S.C. Section 1232g allows the United States Department of Education to withhold federal funding from educational institutions that withhold education records.

Subsection (a)(1)(A) allows parents to access those records. Subsection (d) extends that right to adult students, also.

A private cause of action for violation of FERPA may be brought through 42 U.S.C. Section 1983.

The question for the panel was: when did a private cause of action arise for violations of subsection (a)(1)(A)?

The answer depended on whether a plaintiff must first allege a sufficient number of refusals of access to records by the institution to show that the institution has a policy of withholding such education records. Precedent showed that two acts by an institution were too few to show a policy under FERPA. Gundlach v. Reinstein, 924 F. Supp. 684, 690 n.7, 691-92 (E.D. Pa. 1996).

In 1996, Judge Rebecca Beech Smith of the United States District Court dismissed Mr. Lewin's first claim brought under FERPA. Lewin v. Medical College of Hampton Roads, 931 F. Supp. 443 (E.D. Va 1996). In the complaint dismissed in 1996, Mr. Lewin had alleged only two acts of withholding education records. The 1996 decision addressed a different FERPA subsection, subsection (a)(2), which concerns a different right, the

right to a hearing to challenge unintended errors. Judge Smith's 1996 decision made no mention of subsection (a)(1)(A), no mention of whether a cause of action had arisen for the two acts of withholding records then alleged.

Following Gundlach, Mr. Lewin argued in this appeal that if subsection (a)(1)(A) required a policy, then two acts would not have sufficed to demonstrate such a policy, and Mr. Lewin's (a)(1)(A) claim would not have arisen until the same institution again denied his request--or in other ways manifested its resolve, amounting to a policy--to deny him access to his records. And that is exactly what the same Defendants are alleged to have done, with additional acts, giving rise to the Mr. Lewin' second FERPA complaint which Judge Smith has now dismissed, and which she sanctioned under Fed. R. Civ. P. Rule 11 and Rule 54.

Therefore the panel asked: Does (a)(1)(A) require a policy?

Unfortunately, the panel has given an answer that denies the plain words of the statute. In so doing, the panel violates the Supreme Court's most basic principle of statutory construction.

The first principle of statutory construction must be to begin by acknowledging the existence of a statute's words. To deny that words exist, when they are there to be read in the black-letter law, is to destroy a statute, in whole or in part. The Supreme Court repeatedly holds that statutory construction should not be statutory destruction. Plain words are not to be ignored. "[In construing statutes,] it is our role to make sense rather than nonsense out of the corpus juris." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 101 (1991). "It is an elementary rule of construction that 'the

act cannot be held to destroy itself.'" Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20 (1995) (citation omitted).

The panel held:

> While other sections of FERPA are only actionable upon a showing of an improper "policy," [subsection] (a)(1)(A) contains no reference to a policy of denying access ..."
>
> [1/7/02 Opinion at 5-6 (Addendum ["AD"] 26-27).]

The panel held there is "no reference to a policy" in subsection (a)(1)(A). What, then, is a litigant to make of these words in subsection (a)(1)(A):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children....
>
> 20 U.S.C.A. Section 1232g (a)(1)(A) (emphasis added).

How can "which has a policy of denying" [subsection (a)(1)(A) be "no reference to a policy" [the panel's revision]?

In (a)(1)(A), the alternative clause, "or which effectively prevents" covers those institutions which may officially deny having such a policy, but which make a sham of complying with FERPA, to the extent that they prevent access in a way that is tantamount to a policy of withholding.

To deny statutory words their existence, to simply

delete those words which are still plain in that statute for all to read implicates due process. This is all the more true when substantial sanctions hang in the balance.

By refusing to acknowledge the existence of the visible statutory words, the panel erroneously portrayed Mr. Lewin's claim as lacking all support, and therefore subjected him to the penalties that Judge Smith imposed of $5000.00 in Rule 11 sanctions and $38,482.73 in attorneys' fees.

The panel imposed ex post facto liability on Mr. Lewin, liability for making an "unsupported" claim that was not unsupported when he made it. This petition for rehearing en banc is supported by due process considerations, because the ex post facto prohibition applies through the Due Process clause to liability imposed by courts. Marks v. United States, 430 U.S. 188, 191 (1977); See Bouie v. City of Columbia, 378 U.S. 347, 352-55 (1964); Prater v. U.S. Parole Com'n 802 F.2d 948, 952 (7th Cir. 1986).

III. PANEL DENIED *CAREY v. PIPHUS* AND THE STANDARD OF REVIEW.

At the summary judgment stage, a judge should not weigh the evidence, but merely determine whether there are genuine issues for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Adickes v. S. H. Kress and Company, 398 U.S. 144, 158-59 (1970) ("'[O]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" Id.) (citation omitted).

The panel wholly abandoned this standard by refusing even to acknowledge the existence of Mr. Lewin's strongest claims.

In Carey v. Piphus, 435 U.S. 247, 266-67 (1978), the Supreme Court endorsed as legitimate compensation: (1) nominal damages and (2) damages for mental or emotional distress. Mr. Lewin sought both forms of compensation, and compensation for other injuries, because the Defendants continued to withhold his records even after the two acts of withholding which Mr. Lewin had alleged in his first federal filing.

According to Carey, "mental and emotional distress caused by the denial of procedural due process itself is compensable under [42 U.S.C. Section] 1983." Id. at 264. The Court noted "[d]istress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff." Id. at 263-64. Mr. Lewin alleged such distress. [Joint Appendix ("A") 37 (AD 98) and Opening Brief of Appellant ("OBA") 38 (AD 49).]

The Defendants withheld Mr. Lewin's records in 1998, by denying his FERPA request for a tape recording that was part of his academic record. Mr. Lewin alleged that this 1998 withholding injured his interests in a separate lawsuit which was at that time underway in state court. [OBA 36-37 (AD 47-48).]

The panel offers no authority to cancel out injury to the state lawsuit and mental distress. These injuries are simply swept under the rug by the panel's opinion. The panel simply ignored Mr. Lewin's pleadings. This is an inexplicable reversal of the standard of review.

The panel's only reference to Carey is a discussion limited to nominal damages. Even regarding nominal damages, the panel all but admits that Mr. Lewin's claims cannot be called "unsupported" because the Circuits are split on that very topic, and in this Court the question is one of first impression. By the panel's own admission

then, such a split in authority can hardly support a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73. The panel admits that such a Rule 54 penalty could only be imposed on a plaintiff if his claims had no support:

> A prevailing defendant may recover attorneys' fees in [section] 1983 and [section] 1985 actions only when the plaintiff's claims were "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
>
> [1/7/02 Opinion at 13, (AD 34).]

IV. *SEIGERT v. GILLEY* & DUE PROCESS DENIED ON QUALIFIED IMMUNITY.

"A fundamental requirement of due process is 'the opportunity to be heard.'" Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This Court recognizes that requirement. Schrader v. Harris, 631 F.2d 297, 301 (4th Cir. 1980). The panel erred by basing its decision upon a denial of that fundamental requirement.

The Defendants never raised a defense of qualified immunity. Therefore, Mr. Lewin was not put on notice that the panel might make qualified immunity a basis for its decision. Mr. Lewin never had an opportunity to advance his position that the Defendants were not entitled to qualified immunity. This was never argued.

This points to another serious error by the panel.

The Defendants waived any possible affirmative defense of qualified immunity both in the trial court and indeed, before this Court, because the Defendants never raised that affirmative defense. Arguably, the Defendants never raised it because they knew that Mr. Lewin could rebut it. Regardless, the panel may not raise that

affirmative defense which the Defendants chose to waive. This is the doctrine of the Supreme Court: "Qualified immunity is a defense that must be pleaded by a defendant official." Seigert v. Gilley, 500 U.S. 226, 231 (1991) (citation omitted) (emphasis added).

Therefore, this Court holds:

> [W]e have refused to consider sua sponte a defense of qualified immunity in a [Section] 1983 action when it was not properly preserved below ...
>
> Suarez Corp. Industries v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997)

It should go without saying that the panel should not revise the Defendants' strategy for them and retroactively invoke options which the Defendants waived. Mr. Lewin had no opportunity to be heard about qualified immunity. Denial of that opportunity should not be used to support a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73.

V. PANEL DENIED *CZOSEK v. O'MARA* AND THE STANDARD OF REVIEW.

At the summary judgment stage, it is not the function of the judge to weigh the evidence and determine the truth of the matter. Anderson, 477 U.S. at 249. It certainly is not the function of the judge to manufacture evidence.

The panel has manufactured as a basis for its decision documents that are lacking from the record on appeal.

The panel imagined a document that does not exist: a letter from the United States Department of Education ("DoE") supposedly referring to what the panel called the "Master Challenge Exam."

The panel imagined another document which does exist but which is not to be found in the record: the "Master Challenge Exam" [referred to in the pleadings as the "Master" document].

The panel used these absent or nonexistent documents to strike down part of Mr. Lewin's claims. The panel held:

> The DOE [U.S. Department of Education] has indicated in a letter to Lewin that the Master Challenge Exam, which is a general answer key, is not directly related to Lewin and does not constitute part of his education record. The Master Challenge Exam does not contain Lewin's name, nor does it contain any record of his educational performance. ... we agree with DOE that it is not itself one of Lewin's education records.
>
> [1/7/02 Opinion at 6 (AD 27).]

There is no such letter. The DoE never sent any letter to Mr. Lewin referring to the specific document in question (by whatever name it may be called, "Master Challenge Exam" or "'Master' document").

The panel professes to have knowledge of the contents of the "Master" document. But this is impossible.

The record on appeal, and in the trial court, does not contain the complete "Master" document, or even its cover.

The panel cannot know whether the "Master" document has Mr. Lewin's name printed on it. On the contrary, there was every reason for the panel to assume that Mr. Lewin's name would be on that document. According to Mr. Lewin's pleadings, the "Master"

document matched an exam that was prepared for the sole purpose of being administered only to Mr. Lewin.[1]

If the "Master" document was prepared for an exam that was intended only for Mr. Lewin, then his name might be expected to be on the document. How could the panel deny this when the record is silent?

And why does the panel call that "Master" document "a general answer key"? The "Master" document was the prototype of the exam that had been prepared specifically for Mr. Lewin. It was not a "general" answer key because there was only one unique exam, personally identified to one student. Mr. Lewin's name was on that one unique exam.

Since there was only one exam, and only one "Master" document, that one-to-one correspondence should be conclusive. As long as one was "directly related" to Mr. Lewin, the other had to be directly related to him in equal measure. Quite simply put, the connection is unique and not disputed: it could not be related to anyone or anything else.

Judge Smith's grant of summary judgment to the Defendants was not based upon whether or not the "Master" document was directly related or "personally identifiable" to Mr. Lewin. See Warner v. St. Bernard Parish School Bd., 1998 U.S. Dist. LEXIS 1360 (E.D. La.):

> The regulations promulgated with FERPA define "personally identifiable information" and

---

[1] See, e.g. A. 1065 (AD 107): "The pharmacology exam which was administered only to the Plaintiff clearly was part of the Plaintiff's educational record." (emphasis added). After the 10/29/01 oral argument, Mr. Lewin's 10/30/01 Letter of Supplementary Authorities brought the parts of the record relevant to this, including A. 1064-66, to the panel's attention. (AD 36.)

"record" as follows:

> "Personally identifiable information" includes, but is not limited to:
>
> . . . information that would make the student's identity easily traceable.
>
> 34 C.F.R. [Section] 99.3.
>
> "Record" means any information recorded in any way . . . Id.
>
> "The plain meaning of the statutory language reveals that Congress intended for the definition of ["education records"] to be broad in scope." Belanger v. Nashua, New Hampshire, Sch. Dist., 856 F. Supp. 40, 48 (D.N.H. 1994). ... The Secretary's comments to the Act explain that the definition of "education records" is "all inclusive."

Id. at [*12-*13] (citation omitted) (AD 43.)

If Mr. Lewin needed to allege with any greater emphasis that his identity was "easily traceable" to the "Master" document, he should have been allowed to do so, consistent with the Supreme Court's directive:

> [C]omplaints should be construed to avoid dismissals and the plaintiff at the very least "should be given the opportunity to file supplemental pleadings unless it appears 'beyond doubt' that he cannot state a good cause of action."
>
> Czosek v. O'Mara, 397 U.S. 25, 27 (1970) (citations omitted).

If documentation was lacking from the record on appeal, the panel should not have manufactured it to support a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73.

VI. INTRACORPORATE IMMUNITY FOR OBSTRUCTION OF JUSTICE?

It is a question of exceptional importance whether in this Circuit intracorporate immunity shields obstruction of justice.

Mr. Lewin argued as follows: McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1039-41 (11th Cir. 2000) held that:

> certain kinds of conduct, conduct involving obstruction of justice, has been of such concern to Congress that Congress has enacted statutes punishing obstruction of justice both in civil law and in criminal law. Accordingly, there is a parallel between the civil obstruction of justice statute, 42 U.S.C. Section 1985(2) (first clause), and the criminal obstruction of justice statute, 18 U.S.C. Section 1512. If the object of a conspiracy is obstruction of justice, the obstruction may be reachable under either law, or both. The [Eleventh] Circuit noted that there is no intracorporate immunity for violating the criminal statute, 18 U.S.C. Section 1512. As a general rule, there is no intracorporate conspiracy immunity for criminal conduct. The [Eleventh] Circuit concluded that if obstruction of justice is the target of a civil statute, then the same logic should apply. The lack of immunity should be uniform ...
>
> Reply Brief at 4-5 (AD 59-60) [On 10/30/01, Mr. Lewin moved to advise this Court of a typographical error affecting p. 4 of his Reply Brief, which inadvertently referred to the McAndrew Court as the "Seventh" Circuit.]

Under McAndrew, there is no intracorporate immunity for obstruction of justice, whether civil or criminal. Indeed, Mr. Lewin argues that McAndrew's holding is the unauthorized act exception to the logic of

intracorporate immunity. [Reply Brief at 18-19 (AD 73-74).]

The facts alleged in this case fit within both the civil prohibition (42 U.S.C. Section 1985(2) (first clause)) and the criminal prohibition (18 U.S.C. Section 1512(b)(1) & (2)(A), (B), (C)) against obstruction of justice.

The Defendants sought to prevent the DoE from enforcing subsection (a)(1)(A) of FERPA. They intentionally tried to mislead the DoE by means of a letter dated August 20, 1998. Their letter relied on a misstatement in which they falsely shrank the number of people who had had access to a tape recording. The purpose of this deception was to invoke a loophole that might prevent the DoE from enforcing the Defendants' duty to disclose the recording. [Reply Brief at 17 (AD 72).]

These facts, alleged by Mr. Lewin, fulfil the requirements of 18 U.S.C. Section 1512(b)(1) & (2)(A), (B),(C). The persons intended to be misled were the investigating officials of DoE. The misleading conduct was that defined by 18 U.S.C. Section 1515(a)(3)(A) & (E): knowingly making a false statement, and knowing use of a trick, scheme, or device with intent to mislead. The desired effect of misleading the DoE investigators was to enable the Defendants to withhold the tape recording at that time and into the future, to impair its availability for use in an official proceeding, to evade the legal duty under FERPA to produce it. 1512(b)(2)(A),(B),(C).

Maybe the Defendants' attempt to deceive the DoE investigators was not itself a FERPA violation. But even as an attempt, it still qualified as an overt act of the very kind of conspiracy--justice-obstructing conspiracy--

that should not be shielded.

The question of exceptional importance for this Court is whether intracorporate immunity protects obstruction of justice.

Even if this Court disagrees with McAndrew, Mr. Lewin had support for invoking the unauthorized act exception, and his allegations of conspiracy should not be punished by a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73.

VII. ATTORNEY FEES BECAUSE THE PANEL DENIES *BUDINICH, PAVELIC* AND *LUJAN.*

In Budinich v. Becton Dickinson and Co., 486 U.S. 196, 199-200 (1988), the Supreme Court considered a trial court's decision disposing of the merits of a case. The decision had left unspecified monetary sanctions to be quantified later. The Supreme Court held that the later decision quantifying sanctions was not the "final" decision for purposes of an appeal. A "final" decision is the decision that disposes of the merits of a case.

Even before Budinich made the rule quite plain and definitive, this Court observed: "a merits judgment is not made less final or appealable by an outstanding fee question." Bernstein by Bernstein v. Menard, 728 F.2d 252, 253 (4th Cir. 1984).

In this case, the 5/1/00 Judgment decided the merits. Therefore, according to Budinich, that 5/1/00 Judgment was final.

Also in this case, a 6/27/00 order quantified sanctions.

The panel's supposition that the 6/27/00 order was the "final" order contradicts Budinich.

On 7/11/00, the Defendants filed a Rule 54

motion for fees attributable to the 5/1/00 Judgment, well past the fourteen-day timeliness requirement of Rule 54(d)(2)(B). They did this as an afterthought because they neglected to follow the proper procedures for Rule 11 sanctions.

Mr. Lewin's time to appeal the 5/1/00 Judgment that Rule 11 sanctions be imposed began to be counted from 5/1/00. Had he not timely appealed, that appeal would be barred. If that Judgment was final for Mr. Lewin, it had to be final for the Defendants.

The panel erred to rule as follows:

> In the district court's May 1, 2000 order and accompanying opinion, the court requested an estimation of the defendants' attorneys' fees ... The May 1, 2000 order therefore preserved the issue of the defendants' attorneys' fees until the final order of June 27, 2000, which quantified sanctions, and the defendants had good reason to believe that the district court would treat attorneys' fees as part of Rule 11 sanctions. ... Under these circumstances it was reasonable for the defendants to wait ...
>
> [1/7/02 Opinion at 12 (emphasis added) (AD 33).]

The panel neglects to recognize that if Judge Smith had awarded attorneys' fees under Rule 11, that award would have been reversed on appeal. On this point there can be no doubt. Rule 11(c)(1)(A) required the Defendants to make a separate motion for sanctions. The Defendants never made that motion. They only made a Rule 54 motion, very belatedly, on 7/11/00. They were responsible for knowing Rule 11, and they could not have reasonably believed that its requirements could be avoided. The words of Rule 11 have their plain meaning. Pavelic & LeFlore v. Marvel Entertainment, 439 U.S. 120, 123 (1989). The panel errs by contradicting Pavelic

and the many cases in accord with it. See L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 89-90 (2d Cir. 1998); Johnson v. Waddell & Reed, Inc., 74 F.3d 147, 151 (7th Cir. 1996); Tate v. Lau, 865 F. Supp. 681, 691 (D.Nev. 1994); Cortez v. CMG Worldwide Inc., 962 F. Supp. 308, 313 (N.D.N.Y. 1997); Fat T, Inc. v. Aloha Tower Associates Piers 7, 8, & 9, 172 F.R.D. 411, 415 (D.Hawai'i 1996); Hoydal v. Prime Opportunities, Inc., 856 F. Supp. 327, 329 (E.D. Mich. 1994); Lenoir v. Tannehill, 660 F. Supp. 42, 44 (S.D. Miss. 1986).

At the 3/14/00 hearing [Hearing Transcript, p. 55, lns. 7-10 (A 1047) (AD 97)], and again in a 3/21/00 brief [(A. 232) (AD 100)], Mr. Lewin's counsel put the Defendants on notice that they had not made the required motion.

The Defendants' neglect of Rule 11 was followed by their neglect of Rule 54. Perhaps the Defendants could have argued--though with little expectation of success--that for their Rule 54 motion they should have been allowed an extension of time under Rule 6(b). Then Mr. Lewin would have been able to argue against their motion for an extension of time. But the Defendants never even moved for an extension. The Supreme Court's holding in Lujan v. National Wildlife Federation, 497 U.S. 871, 895-96 (1990) does not allow the panel to give the Defendants that extension in retrospect.

The panel errs to attribute "good reason" to the Defendants, because that contradicts Pavelic. According to Lujan, even "good reason," cannot result in an extension of time after the deadline for filing is past, unless that "good reason" is presented as a motion which both sides may argue.

The panel erred by departing from Budinich, Pavelic, and Lujan, to support a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73.

IX. CONCLUSION?[2] This Court should grant a rehearing en banc.

Respectfully submitted,

RICHARD J. CONROD, SR., P.C.
BY: Richard J. Conrod, Sr.
Virginia State Bar No. 35967
Suite 201
522 S. Independence Boulevard
Virginia Beach, Virginia 23452
Telephone: (757) 456-0883

CERTIFICATE OF SERVICE

Appellant timely files this Petition for Rehearing En Banc pursuant to Rule 35(b) & (c) of the Federal Rules of Appellate Procedure. Rehearing is sought from an Opinion rendered on January 7, 2002. The fourteenth day from that decision is a legal holiday on which this Court is closed, per Rule 26(a)(4). Therefore this Petition is timely filed on the next day, January 22, 2002.

Service of the foregoing Petition was made upon Appellees by mailing true copies thereof by regular United States mail, postage prepaid, to the following counsel of record for the Appellees at their last known mailing addresses on this 22nd day of January, 2002:

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[2] For Section "VIII" of this Petition, see Table of Contents footnote.

Jonathan B. Sprague, Esquire
POST & SCHELL, P.C.
1800 John F. Kennedy Boulevard
19th Floor
Philadelphia, Pennsylvania 19103

David K. Sutelan, Esquire
TROUTMAN SANDERS MAYS & VALENTINE, L.L.P.
2525 Dominion Tower
999 Waterside Drive
Norfolk, Virginia 23510

Richard J. Conrod, Sr.
Of Counsel for Appellant

RECORD NO. 00-1732(L)
CONS./W 00-1943, 01-1165, 01-1335

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,
Plaintiff-Appellant,

v.

WILLIAM J. COOKE, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

TWO SUPPLEMENTAL PAGES FOR THE PETITION FOR REHEARING EN BANC

Richard J. Conrod, Sr.
RICHARD J. CONROD, SR., P.C.
Suite 201
522 S. Independence Blvd.
Virginia Beach, VA 23452
(757) 456-0883

Counsel for Appellant

VII. SANCTIONS BECAUSE THE PANEL REVERSES THIS COURT'S PRECEDENT

This Court has previously leaned toward the doctrine that when new claims arise during the pendency of an action, a plaintiff is not barred from making those new claims the subject of a separate filing. Thus, this Court quotes with approval Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 739 (9th Cir. 1984), cert denied, 474 U.S. 919 (1985):

> "[T]he rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated."
>
> Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770, 774 n.3 (4th Cir. 1991) (emphasis added).

See Pleming v. Universal-Rundle Corp., 142 F.3d 1354 (11th Cir. 1998) ("[T]he doctrine of res judicata does not punish a plaintiff for exercising the option not to supplement the pleadings with an after-acquired claim." Id. at 1357); accord, Computer Associates Intern., Inc. v. Altai, Inc., 126 F.3d 365, 370 (2d Cir. 1997); Cabrera v. City of Huntington Park, 159 F.3d 374, 382 n.12 (9th Cir. 1998).

Mr. Lewin had no warning that the direction of this Court's jurisprudence would suddenly change. According to the panel, the doctrine is now the exact opposite.

Mr. Lewin's allegations are succinctly summarized as follows:

> Before his first federal case began, Mr. Lewin had never requested the "Master" document.

Prior to any request to see it, the Defendants had no obligation to show it to him. Mr. Lewin's FERPA right to see that unique and significant document had never before been violated.

But the Defendants did violate that right. After the filing of his first federal complaint, Mr. Lewin made a request for that document which activated his FERPA right to see it. The Defendants withheld the "Master" document in violation of FERPA's subsection (a)(1)(A). ...

Under subsection (a)(1)(A), the legal process of a FERPA request obliged the Defendants to disclose the "Master" document within 45 days of the request, i.e., within 45 days of 3/1/96. Instead, the Defendants delayed for almost five months. During that time their response to Mr. Lewin's request did not acknowledge the existence of the "Master" document. The Defendants intentionally withheld the document in violation of FERPA's subsection (a)(1)(A) until mere hours before the oral argument on summary judgment. By then it was too late for the document to be seen by both Mr. Lewin and his counsel, and for its significance to be understood.

Reply Brief at 7-8 (Appendix citations omitted) [Addendum].

The panel ruled as follows:

Lewin is barred from now litigating the lateness of [the disclosure of the "Master" document] because he had the opportunity to do that in the first lawsuit. He could have requested a continuance at the summary judgment hearing based on the newly provided information, or he

could have moved for reconsideration once he had the opportunity to appreciate the importance of this document.

[1/7/02 Opinion at 7 Addendum.]

The "lateness" that Mr. Lewin seeks to litigate is a violation of FERPA's subsection (a)(1)(A) that occurred after the filing and during the pendency of his first lawsuit.

Although this Court may depart from the authority quoted favorably by this Court in Young-Henderson, the panel erred to use such a departure to support a Rule 11 sanction of $5,000.00 and a Rule 54 penalty of $38,482.73. That error raises the ex post facto and due process concerns already noted.

> The test for determining whether the retroactive application of a judicial decision violates due process is essentially one of foreseeability.... Perhaps the clearest example is when a court overrules its own precedent.
>
> United States v. Morehead, 959 5.2d 1489, 1512 (10th Cir. 1992) (citations omitted).

IN THE UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,	:	DOCKET NUMBER
Appellant,	:	00-1732(L)
	:	cons./w 00-1943
v.	:	01-1165, and
	:	01-1335
	:	
WILLIAM J. COOKE,	:	
CLINTON H. TOEWE, II	:	
JAMES E. ETHERIDGE, JR.,	:	
ROBERT M. McCOMBS,	:	
JAMES F. LIND, THOMAS J.	:	
MANSER, and MEDICAL	:	
COLLEGE OF HAMPTON	:	
ROADS, a/k/a EASTERN	:	
VIRGINIA MEDICAL	:	
SCHOOL OF THE MEDICAL	:	
COLLEGE OF HAMPTON	:	
ROADS,	:	
Appellees.	:	

APPELLANT'S DUE PROCESS MOTION FOR
PUBLICATION,
ANCILLARY TO HIS PETITION FOR REHEARING
EN BANC,
AND FOR EN BANC DECISION OF THIS MOTION

I. INTRODUCTION

This motion is ancillary to Appellant's Petition for Rehearing En Banc. It seems likely that the important matter raised in this Motion will further inform the Court's review of that Petition. Under Local Rule 40(d), this Motion is also timely because it is also ancillary to the filing of an application for writ of certiorari with the Supreme Court.

Like the Petition for Rehearing En Banc, this Motion is based upon an issue of exceptional importance and involves the uniformity of this Court's decisions. Because the Motion is ancillary to the Petition, Appellant supplies the Court with twenty copies, matching the twenty copies of the Petition. Indeed, given the nature of this Motion, Appellant believes it is appropriate to move herein–and he so moves–that this Motion be decided en banc by this Court.

The Plaintiff-Appellant Jonathan Lewin, by counsel, moves under this Court's Local Rule 36(b), and under the Supreme Court's doctrine of due process that "justice must satisfy the appearance of justice"[1] that this Court publish (1) this Court's January 7, 2002 Per Curiam Opinion in this case, (2) any decision of Appellant's Petition for Rehearing En Banc, and (3) if the Petition is granted, the resulting En Banc Opinion, and (4) this Court's decision of this Motion, and (5) any decision granting sanctions against Appellant. It will be argued that this Court's decision of this Motion has an exceptional nationwide significance for this Court, the Bar, and the public. An enduring controversy which has attracted much critical judicial and scholarly attention about the consequences of unpublished

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[1] "[Under t]he Due Process Clause ...'... to perform its high function in the best way, "justice must satisfy the appearance of justice."'" Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 n.12 (1988) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).)

opinions is now ripe for decision by this Court. The Defendant-Appellees ("Defendants") do not take a position on this motion.

II. THE OPINION QUALIFIES FOR PUBLICATION UNDER LOCAL RULE 36(b).

Before arguing on behalf of the constitutional right at issue, it is important to note that there are standard non-constitutional grounds for publishing the 1/7/02 Per Curiam Opinion.

Local Rule 36(b) provides, in pertinent part: "Counsel may move for publication of an unpublished opinion, citing reasons."

Local Rule 36(a) provides such reasons, explaining that an opinion will be published:

> only if the opinion satisfies one or more of the standards for publication:
> i. It establishes, alters, modifies, or clarifies, or explains a rule of law within this Circuit; or
> ii. It involves a legal issue of continuing public interest; or
> iii. It criticizes existing law; or
> iv. It contains a historical review of a legal rule that is not duplicative; or
> v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

Emphasis is added to subsections i, ii, and v of the Local Rule quoted above, to indicate the pertinent reasons of that Rule which qualify the 1/7/02 Per Curiam Opinion for publication.

The Petition for Rehearing En Banc [Exhibit 1, for brevity attached without its Addendum], and its two Supplemental Pages [Exhibit 2, those Supplemental Pages accepted by a 1/28/02 Order of this Court] show that the Per Curiam Opinion altered and modified several rules of law. There can be no

doubt that some of those rules of law are of continuing public interest to a great number of litigants. Furthermore, some of the modifications create conflicts with other circuits.

A. PER CURIAM RULING ON NOMINAL DAMAGES MAKES "FRIVOLOUS" A CLAIM WHEN THE CIRCUITS ARE SPLIT, WITH SOME CIRCUIT SUPPORT FOR CLAIM, WHEN THAT CLAIM IS OF FIRST IMPRESSION IN THIS COURT.

It is a matter of concern to every plaintiff to know under what circumstances he would be liable for his opponent's attorneys' fees under Fed. R. Civ. P. 54. The Per Curiam Opinion notes that:

> A prevailing defendant may recover attorneys' fees in [section] 1983 and [section] 1985 actions only when the plaintiff's claims are "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
>
> [1/7/02 Opinion at 13, Exhibit 3.]

The Per Curiam Opinion gives a new and more inclusive meaning to "frivolous, unreasonable, or without foundation."

Regarding "whether nominal damages are also available in [section] 1983 actions asserting statutory rights," the Opinion noted that the Circuits are split on that topic, and that in this Court the question is one of first impression. [1/7/02 Opinion at 8, Exhibit 3.]

This Opinion produced a modified rule: In a case of first impression, even if other circuits are split, a plaintiff who cites support from another circuit (previously a legitimate and conclusive protection against "frivolousness") can nonetheless have his claim deemed "frivolous, unreasonable, or without

foundation." This is startling news which every lawyer and litigant needs to know.

B. PER CURIAM RULING ON QUALIFIED IMMUNITY ALTERS THIS COURT'S RULING IN *SUAREZ CORP. INDUSTRIES v. McGRAW.*

Equally important is the Per Curiam Opinion's modification of the rule regarding qualified immunity. It used to be that this Court refrained from invoking qualified immunity sua sponte on behalf of a party who had not invoked it himself.

> [W]e have refused to consider sua sponte a defense of qualified immunity in a [Section] 1983 action when it was not properly preserved below ...
>
> Suarez Corp. Industries v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997)

But the Per Curiam opinion invokes qualified immunity sua sponte on behalf of the Defendants, even though this effectively deprives Mr. Lewin of ever having had the opportunity to argue that qualified immunity should not apply.

This is important news. Plaintiffs in the Fourth Circuit need to know that if their opponents never raise the affirmative defense of qualified immunity in the trial court or on appeal, nonetheless plaintiffs must argue against it prophylactically, or lose the chance to ever argue against it at all.

Because attorneys' fees were based in part upon this Court's new "qualified immunity" practice, the resulting danger that an attorney-fee award will be justified on that basis should be of equal interest to the Bar.

C. RULING ON WHETHER NEW CLAIMS, AFTER AN ACTION IS FILED, MAY BE SUBJECT OF A

SEPARATE FILING ALTERS THIS COURT'S DICTA IN *YOUNG-HENDERSON v. SPARTANBURG AREA MENT. HLTH. CTR.*: RULING ESTABLISHES THAT A NEW CLAIM CAN BE SANCTIONED AS "FRIVOLOUS" FOR BEING SEPARATELY FILED, THOUGH SEPARATE FILING IS SUPPORTED BY THREE CIRCUITS, AND UNTIL THIS APPEAL WAS SUPPORTED BY THE DICTA OF THIS COURT.

The Per Curiam Opinion reversed this Court's earlier dicta approving the doctrine of the Ninth Circuit (also followed by the Eleventh Circuit and the Seventh Circuit) that when new claims arise during the pendency of an action, a plaintiff is not barred from making those new claims the subject of a separate filing.

This Court had previously quoted with approval Los Angeles Branch NAACP v. Los Angeles Unified School District., 750 F.2d 731, 739 (9th Cir. 1984), cert denied, 474 U.S. 919 (1985):

> "[T]he rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated."
>
> Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770, 774 n.3 (4th Cir. 1991) (emphasis added).

See Pleming v. Universal-Rundle Corp., 142 F.3d 1354 (11th Cir. 1998) ("[T]he doctrine of res judicata does not punish a plaintiff for exercising the option not to supplement the pleadings with an after-acquired claim." Id. at 1357); accord, Computer Associates Intern., Inc. v. Altai, Inc., 126 F.3d 365, 370 (2d Cir. 1997)

Mr. Lewin had no warning that the direction of this Court's jurisprudence would suddenly change. According to the panel, the doctrine is now the exact opposite, and this Court stands in direct opposition to the Second, Ninth, and Eleventh Circuits.

All lawyers and litigants need to know that despite support from three other circuits, and from the dicta of this Court, a sudden change of direction in a Per Curiam opinion may be used as a basis for "frivolousness," so that attorneys' fees can be assessed against them.

D. PER CURIAM OPINION'S NEW PRACTICE OF STATUTORY CONSTRUCTION MAKES STATUTORY WORDS CEASE TO EXIST AS IF BY MAGIC

It is especially important for litigants to know how this Court approaches statutory construction. Indeed, this is a matter that is so remarkable, it may be expected to be of interest not just to the Bar, but also to the general public.

The Per Curiam Opinion affirmed attorney fees upon another, most extraordinary basis. The Opinion denied that certain statutory words even exist on the pages of the United States Code, although those words are still there in the statute, on the pages of that Code, for all to read. If the printed words of statutes–and therefore the rights conveyed by statutes–can temporarily disappear when the statute is read by this Court–and attorneys' fees result from such a seemingly magical, temporary disappearance of those statutory words–that is a topic that will lead even observers untrained in the law to wonder and remark.[2]

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[2]The explanation might be less than magical, but not less disturbing. Professor John Wold reported on a study in which he and a colleague interviewed forty-one of fifty-six judges of the California Court of Appeal. The Judges complained of their workload, and many made candid remarks:

These are but four obvious examples of the noteworthy innovation in the January 7, 2002 Per Curiam Opinion.

Several judges claimed that they never checked precedents for accuracy of quotation or citation in nonpublished cases. As one explained: ["]We've got people waiting in the wings! I tell my colleagues, 'We've got too much to do to fool around with something like that in an unpublished opinion. Just get the show on the road and get on to your next case.'["]

Wold, Going through the Motions: The Monotony of Appellate Court Decisionmaking, 62 Judicature 58 (1978).

A former Solicitor General of the United States adds his own observation. See McCree, Bureaucratic Justice: An Early Warning, 129 U. Penn. L. Rev. 777 (1981) (referring to obvious logical flaws in unpublished per curiam opinions: "One explanation of this phenomenon is that such opinions are not authored in chambers and receive only the most fleeting consideration when they reach the judge's desk." Id. at 789.)

Mr. Lewin believes that the Per Curiam Opinion erred in regard to these and other points.[3] Perhaps, en banc, this Court would understand the basis for his belief.

Regardless of Mr. Lewin's belief, the conclusion is inescapable that the Per Curiam Opinion modified rules of law. Moreover, the modifications involve legal issues of continuing public interest, and also create conflicts with decisions in other circuits.

The Per Curiam Opinion qualifies for publication under the Local Rule. Sometimes a litigant brings to a court's attention the fact that an opinion has in fact made new law, and that the opinion therefore qualifies for publication, and the court responds with gratitude for this insight, and orders publication.[4]

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[3]E.g., the Per Curiam Opinion gives short shrift or no shrift to Mr. Lewin's argument in his Opening Brief of Appellant (at 17-20, 42-53, Exhibit 4) and in his Supplemental Brief of Appellant (at 17-27, Exhibit 5) that due process made recusal of the trial judge unavoidable. Indeed, from reading the Per Curiam Opinion, one would never know that Mr. Lewin's recusal argument raised any question of due process, and much less would one know the specific facts on which that argument was based.

See Reynolds & Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L. J. 807:

> A court's assurance that it "has studied the record and is fully advised in the premises," says, in effect, "trust me." A court should do better than that.

Id. at 821 (citation omitted).

That admonition: "trust me," seems especially inadequate when a court reveals patent errors in other parts of the same opinion where it spoke at greater length.

[4]See, e.g., Continental Stock Transfer & Trust Co., v. SEC, 566 F.2d 373, 374 n.1 (2d Cir. 1977) ("We express our appreciation to the [parties] for having brought to our attention the considerations which justify publication

III. THIS MOTION INVOKES A DUE PROCESS RIGHT TO REQUIRE PUBLICATION BECAUSE "JUSTICE MUST HAVE THE APPEARANCE OF JUSTICE" AND BECAUSE DUE PROCESS PROHIBITS EX POST FACTO LIABILITY.

A court might be grateful for the insight that an opinion has made new law, and therefore order publication. But there might be an incentive in the opposite direction.[5] Critics contend that some per curiam opinions are drafted in the knowledge that they make new law, but are nonetheless drafted with the intent that they should never be published–that it is the intent of the drafter to keep changes in the law from applying equally to everyone.[6]

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of our opinion in the instant case. ... [W]e welcome the views of counsel in the unusual situation where failure to publish our opinion may not be in the public interest."). See also, e.g. the observations of the Honorable Philip Nichols, Jr. in his Selective Publication of Opinions: One Judge's View, 35 Am. U. L. Rev. 909 (1986) ("Very often we find our opinions doing duty as precedents in ways quite other than we expected. ... Our surprise may be ... because we have failed to anticipate the problems our opinions will be used to solve." Id. at 921.

[5]Andreani, Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System, 12 Pac. L.J. 727 (1981) ("[C]ourts may be understandably reluctant to air their own dirty laundry, even if brought to their attention." Id. at 733.

[6]See, e.g., the observation of the Honorable Patricia M. Wald, Judge of the Court of Appeals for the District of Columbia Circuit in Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371 (1995):

> Lawyers and commentators regularly raise the specter of "secret justice," "unequal justice," and "sloppy justice" stemming from the growing popularity of unpublished dispositions, particularly in appellate courts, which are supposed to be in charge of keeping the law tidy. ... Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases. But a double-track system allows for deviousness and abuse.

Id. at 1374.

And see Reynolds & Richman, The Non-Prededential Precedent–Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Columbia L. Rev. 1167 (1978):

> Indeed, in some cases it is impossible to believe the court did not realize it was creating law. Why then a decision not to publish? Perhaps the court sought to avoid public disclosure, either because of uncertainty over the doctrine elaborated, or because it wished to decide the case at bar on an impermissible basis–by a rationale that will not necessarily be extended to all like cases.

Id, at 1201.

And see Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981):

> The danger here is that the decision not to publish will affect the reasoning or even the result ... [L]imited publication reduces judicial responsibility by removing the constraints that stare decisis places upon the court. ... If an opinion is not to be published, unwise things may be said without fear that the corpus juris will be adversely affected. Judicial responsibility may also be diminished if courts use the nonpublication list as a repository for troublesome cases presenting issues the court does not wish to address in public.

Id. at 581.

And see an earlier observation by Judge Wald in Wald, The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?, 42 Maryland L. Rev. 766 (1983):

> The practice [of nonpublication] masks and therefore increases the likelihood of nonuniform dispositions ... and give[s] rise to uncertainties about the integrity of courts.

Id. at 783 n. 41.

And see Second Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit: Publication v. Non-Publication of

Critics contend that selective nonpublication allows for "secret law"[7] that perpetrates selective and secret injustice,

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Opinions: A Dialogue, 104 F.R.D. 221 (1984):

> "The Bar and litigants are rightfully concerned at when the decision is made whether to publish. If early in the decision-making process it can affect not only the scholarship but even the result."

Id. at 225; Andreani, supra n. 5:

> [T]he choice regarding publication has the potential for affecting the actual outcome of the appeal itself."

Id. at 732.

> [N]onpublication means that no checks and balances of any kind exist. Justice Gardner of the Fourth Appellate District once conceded that "anonymity and irresponsibility go hand in hand, in all branches of government."

Id. at 736 (citation omitted). And see Arnolds & Kamp, Civil Procedure: A Review of the Published Opinions of the United States Court of Appeals for the Seventh Circuit for the 1981-82 Term, 59 Chi. Kent. L. Rev. 475 (1983):

> [W]hen unpublished orders look like full opinions, as they do in many cases, one cannot help but feel uncomfortable ... the appearance is that the court is trying to hide something, either poor scholarship or special treatment.

Id. at 518.

And see the observation of the Honorable Richard A. Posner, in R. Posner, The Federal Courts: Crisis and Reform (1985) (The "unpublished opinion provides a temptation for judges to shove difficult issues under the rug, in cases where a one-liner would be too blatant an evasion of judicial duty." Id. at 126.

[7]For judicial objections to "secret law" see National Classification Comm'n v. United States, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985); County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting

withheld from public scrutiny because it could not withstand scrutiny.

Suppose that an unpublished per curiam opinion departed from the rule of law. Who would know? Because the opinion was unpublished, it would not be binding precedent. In other words, however important the opinion might be to the parties, it would have little importance to anyone else. It might be unfair, and it might even be violative of one party's Constitutional rights, but without publication, it would lack precedential effect, so the public at large would have little knowledge of it and would not feel itself to be affected. Without precedential effect, it would be considerably less important than other questionable opinions that are published and that are precedents. Because of its comparative unimportance, and because the federal appellate system is already quite congested, there would be little likelihood that the unpublished opinion would be selected for further review.

The Supreme Court is able to grant certiorari to less than one percent of its petitioners.[8] It would appear, then, that there

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from summary reversal, criticizes the Ninth Circuit's choice not to publish its opinion: "That decision not to publish the opinion or permit it to be cited–like the decision to promulgate a rule spawning a body of secret law–was plainly wrong." Id.); United States v. Joly, 493 F.2d 672, 676 (2d Cir. 1974).

The Fifth Circuit has acknowledged that published opinions reduce "the easy temptation or tendency to ill-considered or even arbitrary actions by those having the awesome power of almost final review." That court has publicly admonished itself "that it must–the word is must–never apply [selective nonpublication] to avoid making a difficult or troublesome decision or to conceal divisive or distrubing issues." NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966, 972 (5th Cir. 1970).

[8]See, e.g., Dragich, Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify

is a huge crowd seeking entry through a narrow doorway for review by the Supreme Court, and the non-precedent of an unpublished opinion would seem more than likely to be jostled aside by big-shouldered precedent, and not to find itself within the lucky less-than-one percent.[9]

Commentators conjecture that some drafters choose nonpublication as a strategy to conceal what the drafter expects will be a poorly-reasoned opinion. Then the drafter of the unpublished opinion, believing himself to be unaccountable, could feel free to do something that the rule of law would not permit.[10]

Some commentators propose that the parties whose rights are adjudicated by an unpublished opinion can themselves

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Judicial Decisions Pose a Greater Threat?, 44 Am. U. L. Rev. 757, 767-68 & nn. 47, 48 (1995).

[9]See Reynolds & Richman, The Non-Precedential Precedent, supra note 6 at 1203 (citation omitted):

> [B]ecause an unpublished opinion (in most circuits) has no precedential value, the felt need to correct error in such an opinion is less than with published opinions. The Supreme Court is confronted merely with a wrong result, not with "bad law." It is not often that the Court will make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly, that is, a case whose error is not likely to be perpetuated in future cases.

[10]See note 6 supra.

And see Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("[T]he doctrine of stare decisis is of fundamental importance to the rule of law." Id.) (Quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)); Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 478-79, 494 (1987) ("[T]he rule of law depends in large part on adherence to the doctrine of stare decisis." Id.); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537 (1991) ("[L]itigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally." Id.

provide the solution to this problem. To guard against the possibility that an unpublished judicial opinion may be a departure from the rule of law, the solution is as simple as demanding its publication.[11] The Per Curiam Opinion and this Motion may be a test case for that solution.

A due process right to require publication is a necessary prophylactic against the appearance of abuse: Due process includes appearances. Due process requires the appearance of justice. Consider the appearance that would result in this case if this Court denied this Motion to publish the January 7, 2002 Per Curiam Opinion. The refusal to publish would itself become an issue.

Even those without legal training could easily understand the embarrassing potential of the Per Curiam Opinion's refusal to read the plain words of a statute. Even those without legal training would ask: "Why does the Court think the best solution

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[11]See Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A.J. 1224 (1975):

> The persistence of inconsistent decisions and other abuses connected with the ... nonpublication rule result ... because unpublished opinions lack the potential to embarrass their authors. When judges are able to hide their work product from public view, they become unaccountable ... [T]o have an effective "embarrassment potential" [a]ll members of the bar ... should have the right to order, at any time, that any written disposition by the court be published.
>
> This may increase the volume of printed opinions somewhat. But it is unlikely that truly routine dispositions will appear in the Federal Reporter. If a case furnishes no new or conflicting authority, then it will be of no use to any member of the bar and will be likely to stay out of print.
>
> Id. at 1227.

See also Silverman, The Unpublished Opinion in California, 1976 Cal. St. B. J. 33, 40 (Jan./Feb. 1976).

is to keep us from seeing such a mistake, instead of correcting it?"

A denial of this Motion could appear to the public to be a statement: "We deliberately uphold our unpublished opinion regardless of its departure from the rule of law, and we refuse to publish it because we need to keep such departures secret." Such a position–whether it was actually stated or merely implied–would injure this Court's reputation. The following belief must not gain currency: "There is a body of secret law which applies only under certain circumstances, when fairness appears to have been abandoned for a popularity contest where the favored party is selected to benefit from special treatment which stare decisis and maybe even the Constitution would not allow, but under such circumstances no-one will ever know, because nonpublication makes the drafter of an opinion unaccountable."

The public must never think that a United States Court of Appeals would take that position. If the public thought that, it would lose faith in the appellate process. To prevent the public from thinking that, there must be a due process right for a party to require publication when the party asserts–as Mr. Lewin asserts–the existence of errors in an unpublished opinion.

Justice Brandeis observed: "Sunlight is said to be the best of disinfectants."[12] The drafter of an opinion must anticipate that neither he nor his colleagues can prevent a departure from stare decisis–or indeed, from Constitutional constraints–from becoming a public, precedential embarrassment. The "embarrassment potential" of a litigant's ability to demand

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[12]L. Brandeis, Other People's Money 92 (1914). See also Luban, Settlements and the Erosion of the Public Realm 83 Gerogetown L.J. 2619, 2648 (1995), attributing to Immanuel Kant a corresponding moral insight: "All actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity."

publication is necessary both to deter abuse or mistake before abuse or mistake occurs, and to contribute an incentive for the correction of abuse or mistake that has already occurred.

Due process requires that justice have the appearance of justice. Practices which depart from the rule of law offend due process. If a safeguard is necessary to guarantee the rule of law, then that safeguard follows from due process. A party's right to require publication of an unpublished opinion to expose judicial error is just such a safeguard, given the appearance that otherwise, the impropriety of secret law and special treatment will be perpetuated. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

Appearances matter. Without a due process right to require publication, the likelihood of effective review appears minuscule, and it seems that the rule of law could continue to be circumvented, and due process would continue to be compromised. That is exactly the wrong appearance to sustain public trust and confidence. That same unfortunate appearance would follow from denial of the right to publication sought by this Motion. The public's continued trust in the Courts of Appeals requires this safeguard.

The worst possibility is that unpublished opinions drafted with errors were drafted that way deliberately, for improper motives. There is certainly no proof of this. But the appearance of a deliberate departure from the rule of law would be intensified if it seemed that a continued effort was made to sweep the problem under the judicial rug.[13]

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[13]See Luban, supra note 12 at 2658: "[T]he mass media are all too eager to satisfy the almost unappeasable public appetite for legal infotainment." On broadcast television–to say nothing of the cable channels–"investigative journalism" proliferates. See, e.g., "Nightline," "Dateline," Primetime," "60 Minutes," "60 Minutes II," "48 Hours," "The McNeil-Lehrer Newshour."

It is to be hoped that responsible journalists value prestige as much as a "good story." Mass media reporting about the courts has the potential to provide both prestige and a good story when reporting dignifies itself by commenting on a serious contemporary problem–although commercial considerations may value a problem made more lively by embarrassing revelations–or, depending on how embarrassing the revelations become–a hint of scandal. See People v. Hobson, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976) ("[T]here is potential for jurisprudential scandal in a court which decides one way one day and another way the next." Id.) See also Gulati & McCauliff, On Not Making Law, 61 Law and Contemporary Problems 157 (1998) ("Being detected violating their own public rules of behavior ... should hurt the reputation of both individual judges and of courts as a whole." Id. at 165.)

Ours is indeed a news-intensive age. The ironies or absurdities of certain unpublished opinions in other appeals, as well as the oddities of this one, may yield an intellectual dimension for scholars, but they are not devoid of "human interest." One must not forget that real people have seen those stories from the inside. There is a potential for these matters to one day spill out of scholarly critiques into popular "consumer" journalism. Stories pile up. See, e.g., the curious story of an unpublished opinion that "beat the odds" and was granted certiorari: Reynolds & Richman, The Non-Precedential Precedent, supra note 6 at 1202 n. 173:

> A dramatic example of this problem surfaced recently in the Supreme Court. In reviewing an unpublished decision of the Fourth Circuit, the Supreme Court found that the appellate court had filed an order that, "clearly ha[d] nothing whatsoever to do with the petitioner's case." Proctor v. Warden, 435 U.S. 559, 560 (1978). The Fourth Circuit order had "disposed" of the case by mistaking plaintiff's requested remedy, the court in which it was filed, and apparently, the very name of the case.
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> (For other incongruities in the treatment of particular unpublished appeals, see id at 1193, n. 135 and at 1197 n. 153.)

The footnote just quoted above, describing Proctor v. Warden, does not disclose whether the plaintiff in that case petitioned this Court for rehearing. Assuming that he did not, one must suppose that the errors in his case were inadvertent errors which this Court in good faith would have corrected if it had had the opportunity to do so prior to the grant of certiorari.

The Defendants in this case currently have a motion before this Court to sanction Mr. Lewin for bringing his appeal.

Although it is disturbing to contemplate, it is possible to imagine a "worst-case scenario" in which (1) not only is publication denied despite this Motion, but also (2) Mr. Lewin or his counsel is sanctioned for bringing his appeal, on the ostensible ground that the Per Curiam Opinion affirmed the grant of attorneys' fees in the trial court.

But such a worst-cause scenario–in the aftermath of the Petition for Rehearing En Banc–would be disturbing most of all because it would signify a loss of innocence, or in terms sadly more familiar now, a loss of "plausible deniability."

After this Court has been apprised of the patent errors of the Per Curiam Opinion, it is possible decisions will be made to confirm and compound those errors?

The Petition for Rehearing En Banc, and its two Supplemental Pages, show that due process is badly violated by the errors of the Per Curiam Opinion.

> Federal courts cannot countenance deliberate violations of basic constitutional rights. To do so would violate our judicial oath to uphold the Constitution of the United States.
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> Adamson v. Commissioner of Internal Revenue, 745 F.2d 541, 546 (9th Cir. 1984).

The Judicial Oath, before its words invoke the Constitution, requires each justice or judge to vow to "administer justice without respect to persons, and do equal right to the poor and to the rich" 28 U.S.C. Section 453.

Some commentators warn of the appearance that this Oath is being broken. See, e.g.: Reynolds & Richman, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273 (1996):

> When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case

and decided the appeal according to the law or whether the judge relied on impermissible factors such as race, sex, political influence, or merely the flip of a coin. ...

In per curiam decisions, blame or praise is spread out among three judges with the pernicious consequence of diffusing the judges' responsibility and accountability. Judges who cannot be held individually responsible either for the reasoning or the result have far less incentive to insure that they "get it right." More accurately, given the increasing reliance on staff to prepare opinions, the anonymous judge has far less incentive to see that they get it right.

Id. at 282-83.

Our judicial system can answer the cynics' charges of a systematic tilt toward the rich and powerful only if the courts police themselves rigorously and deliver on their sworn promise of equal justice. ... Damages caused by the current breach of that promise are severe and incalculable.

Id. at 296-97.

If Mr. Lewin is to be punished for his appeal (and for his continued insistence that errors not be swept under the rug), then the public might conclude that this appears to be one more demonstration that the fine sentiments of the Judicial Oath no longer apply to the disposition of cases on appeal, and that the obligation to give sound reasons no longer matters, and that this warning of Professor Carrington puts our current predicament in a nutshell:

But officials are people and that means they are vulnerable to the attractions of self-aggrandizement, and to other influences. Even if they are altruistic, they may use power to pursue social and political agendas not embodied in the law. So law will reflect the tastes of that class of persons from whom the officials are drawn. And if this be so, then perhaps as some of our colleagues may be heard to say, law is a mere deception by which the powerful weaken the resistance of the powerless. ... [L]egal nihilism ... contemplate[s] the dreadful reality of government by cunning and a society in which the only right is might. ... [I]ts lesson [is] that who decides is everything, and principle is nothing but cosmetic.

In addition to the due process argument for publication based upon the due process requirement for the appearance of justice, there is another due process argument based upon the rule of law as follows:

Perhaps it will be argued in opposition to this Motion that the Due Process Clause does not explicitly provide for a right to the publication of an unpublished opinion, even if a party calls that opinion unlawful.

But it is equally true that the Due Process Clause does not explicitly prohibit ex post facto liability, either. And this analogy is very much on point, because due process, where necessary, provides the safeguards that establish and guarantee the rule of law. Ex post facto liability shocks the conscience of courts and of the public at large because it is arbitrary and violates the rule of law. The explicit Ex Post Facto Clause of the Constitution only applies to legislatures. Therefore the Supreme Court interprets the Due Process Clause to prohibit courts from imposing ex post facto liability. Marks v. United States, 430 U.S. 188, 191 (1977); see Bouie v. City of Columbia, 378 U.S. 347, 352-55 (1964); Prater v. U.S. Parole Com'n, 802 F.2d 948, 952 (7th Cir. 1986).

And indeed, the Petition for Rehearing En Banc and its two Supplemental Pages [Exhibit 1 at 4-5, and generally; Exhibit 2] argue that the errors in the Per Curiam Opinion entail impositions of ex post facto liability, prohibited by due process. By extension, denial of publication would only enable and reinforce that very same ex post facto liability that is prohibited by due process. Therefore, in this case, just as ex post facto liability is prohibited by due process, the denial of publication

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Carrington, Of Law and the River, 34 J. Legal Educ. 222, 226-27 (1984).

that makes ex post facto liability possible must be prohibited by due process also.

IV. CONCLUSION

The choice is stark: to publish or not to publish–and if not to publish, then to deny that a party has a due process right to require publication. But the departure from the rule of law in his case is already self-evident. And the problem of unpublished opinions will not go away. Perhaps the test cases which are best remembered are those (1) that contain fact patterns the public can easily understand, and (2) that decide procedures the public can easily understand.

This case involves a fact pattern–e.g., the Per Curiam Opinion's magically disappearing statutory words–and a procedure–i.e., whether courts may resist the exposure of unjust secret law. The public could easily understand both issues.

For good or ill–though one hopes the result will lead to the greater good–the choice this Court makes in regard to this Motion might ultimately contribute to another milestone in legal history.

Respectfully submitted,
RICHARD J. CONROD, SR., P.C.

BY: Richard J. Conrod, Sr.
Virginia State Bar No. 35967
Suite 201
522 S. Independence Boulevard
Virginia Beach, Virginia 23452
Telephone: (757) 456-0883
Facsimile: (757) 456-2336

CERTIFICATE OF SERVICE

I, RICHARD J. CONROD, SR., ESQUIRE, certify that on February 12, 2002, I caused a true and correct copy of this Appellant's Due Process Motion for Publication, Ancillary to His Petition for Rehearing En Banc, and for En Banc Decision of This Motion to be sent by regular United States mail, postage prepaid, to the offices of the following counsel:

David Kegebein Sutelan, Esq.
MAYS & VALENTINE, L.L.P.
2525 Dominion Tower
999 Waterside Drive
Norfolk, Virginia 23510

Jonathan B. Sprague, Esq.
POST & SCHELL, P.C.
1800 John F. Kennedy Boulevard, 19th Floor
Philadelphia, Pennsylvania 19103

Richard J. Conrod, Sr.
Attorney

DATED: February 12, 2002

RECORD NO. 00-1732(L)
CONS./W 00-1943, 01-1165, 01-1335

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN LEWIN,
Plaintiff-Appellant,

v.

WILLIAM J. COOKE, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT NORFOLK

PETITION FOR REHEARING EN BANC AND FOR PUBLICATION

Richard J. Conrod, Sr.
RICHARD J. CONROD, SR., P.C.
Suite 201
522 S. Independence Blvd.
Virginia Beach, VA 23452
(757) 456-0883

Counsel for Appellant .

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I. STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

1. UNIFORMITY OF DECISIONS

With particular reference to the amended language of the March 8, 2002 opinion, en banc rehearing is sought because the panel decision conflicts with precedent of the Supreme Court:

> Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978);
>
> Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995);
>
> Czosek v. O'Mara, 397 U.S. 25 (1970).

Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.[1]

2. THIS PETITION SEEKS BOTH REHEARING EN BANC AND PUBLICATION.

Hard cases make bad law.[2] This must have been a hard case for the per curiam panel because the panel produced peculiar law. Indeed, the January 7, 2002 opinion was so peculiar, and so much in contradiction to

---

[1] En banc rehearing is still sought because the panel decision conflicts with precedent of the Supreme Court and of this Court as set forth in documents previously filed with this Court, i.e., in Appellant's first Petition for Rehearing En Banc, Exhibit 3, pp. 5-15 and in that First Petition's Two Supplementary Pages, Exhibit 4.

This Court may deem the arguments in those Exhibits to be incorporated by reference and to be included again in this Petition, should it please the Court to do so.

[2] Considering such cases, Justice Holmes warned against the "accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." Northern Securities Co. v. U.S., 193 U.S. 197, 400 (1904).

the law on the books, that the panel felt obliged to amend the January 7, 2002 opinion [Exhibit 1] with a new opinion issued on March 8, 2002 [Exhibit 2]. But the admission of error regarding the peculiarities of the January 7 opinion falls short of what the law requires. The amended opinion of March 8, 2002 is still intended to uphold the trial court's sanctions, albeit on different grounds. The different grounds are still erroneous. It appears as if the decision in this case favors one side in derogation of precedent. That appearance is reinforced because the opinion is unpublished, and thus it may seem intended to avoid scrutiny. The unpublished opinions of January 7 and March 8, 2002 appear to be examples of the very harms that commentators warn against in connection with unpublished "secret law". [Exhibit 5, pp. 8-20.] That is why the Appellant, Mr. Lewin, asks this Court both for rehearing en banc and for publication: publication of the March 8, 2002 opinion, and publication of any response to this Petition. See the argument in Exhibit 5, pp. 12-20, that due process requires publication when an appellant asks for publication because he protests that an unpublished opinion is unlawful.

It appears that the per curiam panel amended its opinion January 7, 2002 sua sponte in reaction to documents that are now attached to this Petition without their own exhibits, for brevity:

(1) Appellant's January 22, 2002 "Petition for Rehearing En Banc" [("First Petition") Exhibit 3];

(2) that First Petition's Two Supplemental Pages [Exhibit 4];

(3) "Appellant's Due Process Motion for Publication, Ancillary to his Petition for Rehearing En Banc, and for En Banc Decision of this Motion" filed February 12, 2002 [("Publication

Motion") Exhibit 5].

The Publication Motion noted that the defects in the January 7, 2002 opinion would be easy for the public to understand. [Exhibit 5, pp. 6, 20.] But the defects in the March 8, 2002 amended opinion would be just as easy for the public to understand as those of the January 7, 2002 opinion. As long as this Court allows secret law to remain secret, public suspicion will result if the secret law in question is shown to be different from the published law of this Court or of the Supreme Court.

II. THE NEW RATIONALE OF MARCH 8, 2002 IS INADEQUATE, AND CANNOT SUPPORT SANCTIONS.

There are reasons why the January 7, 2002 opinion could be an embarrassment to this Court. One of the reasons is that it denied the existence of the words of a statute. It made the words of a statute disappear as if by magic even though those words were still there to be read by the public in plain English, in cold print, in the black letter law of the United States Code.

By refusing to acknowledge the existence of the visible statutory words, the January 7 opinion erroneously portrayed Mr. Lewin's claim as lacking all support, and therefore subjected him to the penalties that the trial court imposed of $5000.00 in Rule 11 sanctions and $38,482.73 in Rule 54 attorneys' fees.

Now, it appears that an inadequate attempt has been made to correct the problem. New "reasoning" has been substituted in the March 8, 2002 opinion for the old "reasoning" that made statutory words cease to exist as if by magic. But the new "reasoning" fares no better. It still cannot support a holding that Mr. Lewin's claim lacked all support. To subject him to sanctions on the basis of the inadequate substituted reasoning is also quite

peculiar.

By revising that part of the January 7, 2002 opinion which described subsection (a)(1)(A) of the Family Educational Rights and Privacy Act ["FERPA"], 20 U.S.C. Section 1232g [Exhibit 6], the panel has admitted that the January 7, 2002 opinion mischaracterized the statute. Unfortunately, the March 8, 2002 opinion now mischaracterizes and cancels the relevant part of that statute a second time. The March 8, 2002 opinion offers incorrect statutory construction which conflicts with the doctrine of the Supreme Court in Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20 (1995). This incorrect construction is far from the most natural reading of the statute, and because it cannot be regarded as the only possible reading, it cannot be used to uphold an award of sanctions. The March 8, 2002 opinion compounds the statutory construction error by also mischaracterizing the record.

Why is there a March 8, 2002 opinion? Only because of the earlier error on the face of the January 7 opinion, an error so patent that it could not be ignored. But the March 8 opinion makes errors of its own in an apparent attempt to keep the January 7 result. The substituted reasoning of March 8 is inadequate. Given the track record, and the partial admission of error by the panel, the need for closer scrutiny is self evident.

The new version's statutory construction is contrary to the doctrine of the Supreme Court. In Citizens Bank of Maryland, the Supreme Court held: "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" Id., 516 U.S. at 20 (citation omitted). It is error to construe statutory language so that some terms would make other terms meaningless nullities, devoid of content. Id. But that is exactly what

the new version does.

The new version struggles with FERPA's subsection (a)(1)(A). Specifically, it struggles with the question of whether a plaintiff asserting a private right of action must show that an educational institution has manifested a "policy" of withholding the plaintiff's education records. Precedent shows that two acts by an institution were too few to show a policy under FERPA. Gundlach v. Reinstein, 924 F. Supp. 684, 690 n.7, 691-92 (E.D. Pa. 1996).

The language of subsection (a)(1)(A) makes specific reference to a policy:

> No funds shall be made available under any applicable program to any educational agency or institute which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children....
>
> 20 U.S.C.A. Section 1232g(a)(1)(A) (emphasis added).

The January 7, 2002 opinion denied that subsection (a)(1)(A) contained any reference to a policy at all. It stated:

> While other sections of FERPA are only actionable upon a showing of an improper "policy", [subsection] (a)(1)(A) contains no reference to a policy of denying access..."
>
> [Exhibit 1 pp. 5-6.]

How can "which has a policy of denying" [subsection (a)(1)(A)] be "no reference to a policy" [the

January 7 opinion]? The January 7 opinion was obviously wrong.

The March 8 amendment to the January 7 opinion is obviously wrong again. Aiming to achieve the same result of imposing sanctions on Mr. Lewin, this time with a substituted rationale, the amendment does what the Supreme Court forbade in Citizens Bank of Maryland. It misconstrues the statutory language so that its terms appear to be in conflict with each other, one term destroying the other so that the destroyed term becomes wholly superfluous. It works a statutory (de-)construction on the phrase: "which has a policy of denying, or which effectively prevents." Can the two terms, "policy of denying" and "or which effectively prevents" coexist in a harmonious and meaningful way, each term complementing the other, so that each term is truly an alternative to the other, covering territory the other does not cover? Yes, the two terms can, and should be read to do that.

"Policy of denying" means policy of denying. That is easy.

"[O]r which effectively prevents" should be read to cover different and complimentary ground, ground that would be a true alternative to an official policy of denying, ground which would be the qualitative equivalent of a policy. The most natural reading of this term is that it applies to institutions which may officially deny having such a policy, but which make a sham of complying with FERPA, to the extent that they prevent access in a way that is tantamount to a policy of withholding. An institution that has shown on a sufficient number of occasions that it does not allow access regardless of its official policy statements to the contrary would be covered by the statute.

But the March 8 opinion chooses a reading that is forced and unnatural, a reading that completely removes the need to manifest a policy, whether official or unofficial. The March 8 opinion does not dispute the precedent that more than two acts of withholding records are needed to manifest a policy. But it proposes that one act of withholding records is enough to trigger a private right of action under FERPA's subsection (a)(1)(A) as long as the act of withholding is "effective".

Any action is "effective" if it does what it is intended to do. Is that what "effective" means in this context? Why even mention a policy, if no policy is required, if all that is needed is a single act which carries out the actor's intent? Why was the word "policy" mentioned if it is a nullity?

According to the March 8 version of statutory construction, the "or" of "or which effectively prevents" does not indicate an equal alternative to a policy, which would approximate a policy and thus require an equivalent showing on the part of a plaintiff. For the March 8 opinion, "effectively prevents" means nothing more than "prevent one time in a way which is not in itself ineffective."

It is absurd to suppose that when Congress wrote: "which has a policy of denying, or which effectively prevents," Congress was really intending to say nothing, or the mere equivalent of nothing: talking about a policy and yet making policy irrelevant.

It is an error to construe statutory language so that some terms would make other terms meaningless nullities, devoid of content. "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" Citizens Bank of Maryland, 516 U.S. at 20 (citation omitted).

The March 8 opinion has a fallback position, but that is also incorrect. The fallback position misconstrues the record.

The March 8 opinion does not dispute the precedent that more than two acts of withholding records are needed to manifest a policy. It simply declares that there were more than two acts of withholding Mr. Lewin's records before Mr. Lewin's first federal filing in 1995. It refers to a document, the "October 8, 1999, motion for judgment filed in Norfolk Circuit Court (which was subsequently removed to federal court)" to support its claim. But that document contradicts the claim.

How is it possible for the March 8 opinion to have made that mistake?

One might as well ask: How was it possible for the January 7 opinion to make statutory words disappear?

Maybe a clue can be found in the January 7 mistake. The January 7 opinion wrongly supposed that FERPA's subsection (a)(1)(A) made no reference to a policy. In actual fact, there is a different subsection of FERPA in close proximity to (a)(1)(A), which bears a close resemblance to (a)(1)(A), and which makes no reference to a "policy". That "lookalike" subsection is subsection (a)(2).

A less-than-careful reader might confuse the two subsections.

Further, subsection (a)(1)(A) guarantees the right of a student's parents--and therefore the right of an adult student, through FERPA's subsection (d)--to have access to his education records.

But subsection (a)(2) guarantees a different right: the right to a hearing in which to challenge unintended

mistakes in the student's education record.

These two subsections are distinct. Denial of the right to see the record is not logically the same as denial of the right to a hearing.

The January 7 and March 8 opinions have not fully grasped this distinction.

Mr. Lewin alleged that before his first federal filing, the Defendants twice denied him access to his education record.

The first denial concerned his request to see an examination which he had sat for on April 15, 1991.

The factual allegations of this denial are found in his October 8, 1999, Motion for Judgment and its attachments, filed in Norfolk Circuit Court, reproduced in the Joint Appendix ["A"]:

> 36. The Defendants' pattern of behavior included the following:
>
> (a) Cooke and Toewe combined to deny Mr. Lewin's access to Mr. Lewin's April 15, 1991 pharmacology exam until December 6, 1991 ...
>
> [A. 23, Exhibit 7]

The ongoing process of decision in which Cooke and Toewe combined to deny access to the exam is further explained in an attachment:

> 17. Plaintiff delivered to Cooke an April 22 letter requesting access to the exam.
>
> 18. Cooke refused to let Plaintiff see the exam. Cooke told Plaintiff to ask Toewe for permission. Plaintiff delivered to Toewe an April 24, 1991 letter requesting access to the exam.

> 19. Toewe mailed to plaintiff an April 25, 1991 letter stating "after consultation with Dr. Cooke, I concur with his decision that you not be provided access to the examination which you took on Monday, April 15th."
>
> [A. 50, Exhibit 7]

In other words, one official referred Mr. Lewin to a superior official in the ongoing process of deciding one request. Within a short time-frame, two officials concurred in denying the same request. That one request was appealed, from one official to the other. But it was the same request, treated to one ongoing determination. There were not many separate requests for separate records, separately denied across a widely separated time span.

In the fourteenth century, William of Ockham famously warned theorists not to multiply entities beyond necessity, i.e., to look for the simplest explanation, an admonition honored by philosophers today as "Occam's Razor".

The record does not require or support a multiplication of requests and denials: not with regard to the request for the exam, and not with regard to the request for the tape recording.

Mr Lewin sought access to a tape recording. The allegations in the record state:

> 36. ...(c) EVMS, through Sheila Jones, the SPC secretary, tape recorded the entire March 24, 1993 SPC meeting, which included a session before Mr. Lewin was invited into the meeting, and an SPC deliberation after Mr. Lewin was asked to leave. The next day, Mr. Lewin presented to Jones and to Jennifer Gray, McCombs' secretary, requests to

> review that tape recording. On April 1, 1993, McCombs permitted Mr. Lewin to hear only an abridged recording which McCombs had doctored to omit the SPC deliberations. McCombs had borrowed the original tape from Jones, to play it and prepare the abridged copy that he permitted Mr. Lewin to hear. After hearing the abridged tape, Mr. Lewin spoke to McCombs that same day, and then delivered on April 1, 1993 letter to confirm, as he had explicitly specified in their conversation that day, that he requested to review the entire recording that included the SPC deliberations. ...In that April 1 conversation, McCombs had admitted that the deliberations existed on tape, and he denied Mr. Lewin's request to hear them. He repeated this admission and denial in an April 22, 1993 letter.
>
> [A. 24-25, Exhibit 7.]

This is the account of the denial of one request. At the outset, an official, McCombs, responded to a letter presented to his secretary, by allowing Mr. Lewin to hear part of a tape recording. Since Mr. Lewin had not thought it necessary to specify that he wished to hear the entire tape recording, it seemed that further clarification was needed. Therefore, Mr. Lewin spoke to McCombs. To make sure that there was no possibility that Mr. Lewin might have misunderstood McCombs' response, Mr. Lewin sought confirmation in writing as to what McCombs had said to him during their conversation. McCombs provided that confirmation.

If Mr. Lewin needed to allege with any greater emphasis that his allegations denote the denial of one request for access to the exam, and the denial of one request for access to the tape, then he should have been allowed to do so, consistent with the Supreme Court's

directive:

> (C)omplaints should be construed to avoid dismissals and the plaintiff at the very least "should be given the opportunity to file supplemental pleadings unless it appears 'beyond doubt' that he cannot state a good cause of action."
>
> Czosek v. O'Mara, 397 U.S. 25, 27 (1970) (citations omitted).

Mr. Lewin's position as to the record and the statute is certainly not without reason. Simply because it is not without reason, sanctions are not warranted.

All the other allegations of events related to FERPA before Mr. Lewin's first federal filing describe denials of Mr. Lewin's requests for a hearing under the separate subsection of FERPA, subsection (a)(2). Maybe the March 8 opinion confused requests for a hearing under (a)(2) with requests to see the education record under (a)(1)(A). But the two kinds of requests are logically, factually, and most importantly, according to FERPA, legally distinct.

Contrary to the March 8 opinion, there were only two denials of access to education records before Mr. Lewin's first federal filing.

Mischaracterization as a possible strategy in judicial rhetoric has not escaped the attention of legal commentary. Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit describes mischaracterization as a strategy used to engineer an outcome and lessen the likelihood of further review. She writes:

> And sad to say, judges occasionally do fall victim to the temptation to present the facts in a skewed way, leaving out important ones, citing

> incomplete excerpts from testimony, conspicuously downplaying evidence going in the other direction... Although indefensible, this practice is not easily discoverable to an opinion reader, unless there is a dissenter who points it out. Unlike a blatant misinterpretation of a precedent--or even a questionable interpretation of a statute--the reader cannot go to the library and read the original source. ...Moreover, the likelihood of a case being reviewed on appeal over an alleged factual misstatement in the opinion is nil. The higher the court, the more likely it sees its function as purely one of reviewing errors of law. If, then, a judge shades the record so as to support a particular result, the decision will be "review proof" unless his own colleagues take up the torch. And a dissenting judge pleading for en banc review feels she is baying at the moon when her pleas are based on the majority's failure to consider or accurately report certain facts.
>
> Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. of Chicago L. Rev. 1371, 1389-90 (1995).

Is mischaracterization the kind of judicial error that remains forever "below the radar", in the blind spot, out of sight and out of mind? Is it the final answer to this troublesome appellant who resisted having his case swept under the rug?

Maybe mischaracterization would have that effect if that was the only issue. But it is not the only issue. There are still issues of law—of unlawful changes of law—in these January 7 and March 8 unpublished opinions. Moreover, this case—when it seeks additional review—brings with it an embarrassing track record.

The way statutory words disappeared as if by magic from the January 7 opinion was a vivid illustration of a problem. It was a vivid illustration of how this unpublished exercise in secret law is patently unlawful. Beyond being an illustration, it was not crucial, because most people are not affected by the statutory words which had temporarily disappeared.

But many people are affected by other unlawful aspects of the two opinions, aspects which the March 8 opinion neglected to change. For example, here is but one of the questions that seems well-suited for a Petition for Writ of Certiorari:

> Whether in light of the Supreme Court's doctrine that a fundamental right of due process is the opportunity to be heard, Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and in light of the Supreme Court's doctrine that qualified immunity is an affirmative defense that must be raised by the party who is to benefit from it, Seigert v. Gilley, 500 U.S. 226, 231 (1991), the Fourth Circuit erred by applying qualified immunity sua sponte on behalf of the Defendants who did not raise that affirmative defense in the trial court or on appeal, and whether the Fourth Circuit's unpredictable reversal of its own prior holding against such a sua sponte application of qualified immunity in Suarez Corp. Industries v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997) deprived Mr. Lewin of his due process opportunity to be heard to argue against qualified immunity.

[See Exhibit 3, pp. 7-8; Exhibit 5, p. 4.]

It should be apparent from this question that the unpublished opinions' deviations from stare decisis affect larger groups of people. Even worse than the

unpredictable reversal of this Court's holding in Suarez Corp. Industries is the appearance that the reversal was performed in secret for the purpose of upholding sanctions against Mr. Lewin. Such a sleight of hand truly looks like an imposition of ex post facto liability. "(T)here is potential for jurisprudential scandal in a court which decides one way one day and another way the next." People v. Hobson, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976). And even if this Court decides one way one day, and another way the next, this Court should not uphold sanctions against a plaintiff who conformed his conduct to what was this Court's then-current position until this Court changed its mind. Mr. Lewin conformed his conduct to what was this Court's then-current position (until this Court changed its mind) in other ways also. Thus, another question that seems well-suited for a Petition for Writ of Certiorari would be:

> Whether the Fourth Circuit erred by deeming Mr. Lewin frivolous for his argument that when new claims arise during the pendency of an action, a plaintiff is not barred from making those new claims the subject of a separate filing, especially in light of prior dicta from the Fourth Circuit supporting his position, Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770, 774 n.3 (4th Cir. 1991), and support from three other Circuits, cited by Mr. Lewin in the trial court and on appeal. Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1357 (11th Cir. 1998); Computer Associates Intern., Inc. v. Altai, Inc., 126 F.3d 365, 370 (2d Cir. 1997); Cabrera v. City of Huntington Park, 159 F.3d 374, 382 n.12 (9th Cir. 1998).
>
> [Exhibit 4, pp. 1-2; Exhibit 5, pp. 4-6.]

The contrast between this Court first approving a doctrine and then punishing an appellant for following it would also be easy for the public to understand, and should be of concern to everyone.

Furthermore, the seeming reluctance of this Court to publish the secret law of the unpublished opinions could bring to the Supreme Court the question of whether an appellant has the due process right that Mr. Lewin asserts to require publication. See Exhibit 5, pp. 12-20.

As for the March 8 misconstructions of subsection (a)(1)(A) and of the record on appeal, the opinion has not shown that no reading is possible under which the statute and the facts could support Mr. Lewin's claims. Attorney fees may only be imposed on a plaintiff if his claims have no support from any possible construction of the law and of the facts:

> A prevailing defendant may recover attorneys' fees in [section] 1983 and [section] 1985 actions only when the plaintiff's claims were "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
>
> [Exhibit 1, p. 13; Exhibit 2, p. 13.]

Even if this Court wanted to give the January 7 and March 8 opinions every benefit of every doubt, it cannot be said that these opinions justified an award of sanctions.[3]

---

[3] It should also be noted that the trial court had even more difficulty than the per curiam unpublished opinions in distinguishing the different subsections of FERPA. The trial court never mentioned FERPA's subsection (a)(1)(A), and seemed unable or unwilling to recognize a distinction between FERPA's subsections (A)(1)(A) and (a)(2), despite Mr. Lewin's two motions for reconsideration, and a motion to recuse which focused on the trial court's persistent lack of

III. CONCLUSION

This Court should grant rehearing en banc, and publication, as requested.

Respectfully submitted,

RICHARD J. CONROD, SR., P.C.

BY: Richard J. Conrod, Sr.
Virginia State Bar No. 35967
Suite 201
522 S. Independence Boulevard
Virginia Beach, Virginia 23452
Telephone: (757) 456-0883

CERTIFICATE OF SERVICE

Appellant timely files this Petition for Rehearing En Banc and for Publication pursuant to Rule 35(b) & (c) of the Federal Rules of Appellate Procedure. Rehearing is sought from an Opinion rendered on March 8, 2002.

Service of the foregoing Petition was made upon Appellees by mailing true copies thereof by regular United States mail, postage prepaid, to the following counsel of record for the Appellees at their last known mailing addresses on this 22nd day of March, 2002:

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response to this distinction. [See A. 1180-83, Exhibit 8; A. 1317-30, Exhibit 9; A. 1536-37, Exhibit 10.]

Jonathan B. Sprague, Esquire
POST & SCHELL, P.C.
1800 John F. Kennedy Boulevard
19th Floor
Philadelphia, Pennsylvania 19103

David K. Sutelan, Esquire
TROUTMAN SANDERS MAYS & VALENTINE, L.L.P.
2525 Dominion Tower
999 Waterside Drive
Norfolk, Virginia 23510

Richard J. Conrod, Sr.
Of Counsel for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN LEWIN, *Appellant*,	: DOCKET NUMBER
	: 00-1732(L)
v.	: cons./w 00-1943
	: 01-1165, and
	: 01-1335
WILLIAM J. COOKE,	;
CLINTON H. TOEWE, II	:
JAMES E. ETHERIDGE, JR.,	;
ROBERT M. McCOMBS,	:
JAMES F. LIND, THOMAS	:
J. MANSER, and MEDICAL	:
COLLEGE OF HAMPTON	:
ROADS, a/k/a EASTERN	:
VIRGINIA MEDICAL	:
SCHOOL OF THE MEDICAL	:
COLLEGE OF HAMPTON	:
ROADS,	:
Appellees.	:

APPELLANT'S AMENDED DUE PROCESS MOTION FOR PUBLICATION, ANCILLARY TO HIS PETITION FOR REHEARING EN BANC

I. INTRODUCTION

This motion is ancillary to Appellant's Petition for Rehearing En Banc and for Publication, filed March 22, 2002. ("3/22/02 Petition") [attached here as Exhibit 1, without its own Exhibits for brevity.]

In the 3/22/02 Petition, Appellant made a request for publication of the opinion which this Court amended on March 8, 2002. He styled his request as part of the relief sought by his 3/22/02 Petition. There is no established format to show whether a due process request for publication is more properly styled as a petition or as a separate motion. Because the Appellant wishes to give this Court every opportunity to rule upon the request in whatever manner this Court prefers, he also presents the request as this separate Motion ancillary to his 3/22/02 Petition.

Whereas the 3/22/02 Petition seeks decision en banc, this separate Motion seeks decision by one judge, or by the per curiam panel, however this Court prefers.

Appellant is cognizant that the matter presented in this Motion will further inform the Court's review of the Petition. Therefore, and because the Motion is ancillary to the 3/22/02 Petition, Appellant supplies the Court with twenty copies, matching the twenty copies of the Petition.

Under Local Rule 40(d), this Motion is also timely because it is also ancillary to the filing of an application for writ of certiorari with the Supreme Court.

The Plaintiff-Appellant Jonathan Lewin, by counsel, moves under this Court's Local Rule 36(b), and under the Supreme Court's various doctrines of due process, including the doctrine that "justice must satisfy

the appearance of justice",[1] that this Court publish (1) this Court's March 8, 2002 amended version of the January 7, 2002 Per Curiam Opinion in this case, (2) any decision of Appellant's 3/22/02 Petition, and (3) if the 3/22/02 Petition is granted, the resulting En Banc Opinion, and (4) this Court's decision of this Motion. It will be argued that this Court's decision of this Motion has an exceptional nationwide significance for this Court and other Courts of Appeals, the Bar, and the public. An enduring controversy which continues to attract much critical judicial and scholarly attention about the consequences of unpublished opinions is now ripe for decision by this Court. The Appellees take no position on this motion.

II. ARGUMENT

This Court's per curiam panel issued its first unpublished opinion in this case on January 7, 2002, [Exhibit 2], and its second unpublished opinion--to correct the first--on March 8, 2002 [Exhibit 3]. There is now no question that the January 7 opinion was unlawful. That opinion denied the existence of the words of a statute. The January 7 opinion made the words of a statute disappear as if by magic even though those words were still there to be read by the public in plain English, in cold print, in the black letter law of the United States Code.

By refusing to acknowledge the existence of the visible statutory words, the January 7 opinion erroneously portrayed Mr. Lewin's claim as lacking all support, and therefore subjected him to the penalties that the trial court imposed of $5000.00 in Rule 11 sanctions and

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[1] "[Under the Due Process Clause ...'... to perform its high function in the best way, "justice must satisfy the appearance of justice."" Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 865 n.12 (1988) (citation omitted).

$38,482.73 in Rule 54 attorneys' fees.

Why is there a March 8, 2002 opinion amending the January 7 opinion in this case? Only because of the earlier error on the face of the January 7 opinion, an error so patent that it could not be ignored. The January 7 opinion mistakenly denied the existence of words from the Family Educational Rights and Privacy Act ["FERPA"], 20 U.S.C. Section 1232g [Exhibit 4].

FERPA's subsection (a)(1)(A) specifically refers to a policy:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .
>
> 20 U.S.C. Section 1232g (a)(1)(A) (emphasis added)

The January 7, 2002 opinion denied that subsection (a)(1)(A) contained any reference to a policy at all. It stated:

> While other sections of FERPA are only actionable upon a showing of an improper "policy", [subsection] (a)(1)(A) contains no reference to a policy of denying access ..."
>
> [Exhibit 2 pp. 5-6.]

How can "which has a policy of denying" [subsection (a)(1)(A)] be "no reference to a policy" [the January 7 opinion]? The January 7 opinion was obviously wrong.

It appears that the per curiam panel amended its opinion of January 7, 2002 in reaction to documents that are now attached to this Motion without their own exhibits, for brevity:

> (1) Appellant's January 22, 2002 "Petition for Rehearing En Banc" [("First Petition") Exhibit 5];
>
> (2) that First Petition's Two Supplemental Pages [Exhibit 6];
>
> (3) "Appellant's Due Process Motion for Publication, Ancillary to his Petition for Rehearing En Banc, and for En Banc Decision of this Motion" filed February 12, 2002"
>
> [("First Publication Motion") Exhibit 7].

The First Publication Motion noted that the defects in the January 7, 2002 opinion would be easy for the public to understand. [Exhibit 7, pp. 6, 20.]

The defects in the opinion of March 8, 2002 will be just as easy for the public to understand as those of January 7, 2002.

Inappropriately unpublished "secret law" has attracted scornful comment from many quarters, including the Supreme Court.[2] As long as this Court allows secret

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[2] See, e.g., County of Los Angeles v. Kling., 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal, criticizes the Ninth Circuit's choice not to publish its opinion: "That decision not to publish the opinion or permit it to be cited--like the decision to promulgate a rule spawning a body of secret law--was plainly wrong." Id.); and see Exhibit 7, pp. 8-15, nn. 6-13; and see Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated on other grounds 235 F.3d 1054 (2000):

> We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as precedent. If this is true, the judicial system is

law to remain secret, public suspicion will result if the secret law in question is shown to be different from the published law of this Court or of the Supreme Court.

Mr. Lewin submitted his First Publication Motion to this Court on February 12, 2002.

That Motion extensively documented the controversy about unpublished opinions which has already attracted much critical attention from judges and legal scholars. [See Exhibit 7, pp. 8-15, nn. 6-13.] But the controversy is even more widespread than that First Publication Motion could document. Inevitably, the controversy spreads beyond the confines of the ivory tower of legal scholarship. Commentary skeptical of judicial motives for nonpublication appears in more popular media. It is easy to imagine how that skepticism could draw support from the magic-disappearing-act with statutory words, and from the still-uncorrected other defects that plague this case:

> Many judges now feel that they handle unpublished cases in such a hasty, slapdash manner that they don't feel sufficiently confident in their own reasoning to want those cases to serve as precedent.
>
> R. Parloff, Publication Rights, The American Lawyer, October 5, 2000 [Available at www.nonpublication.com under "Press Clippings". As suggested by the name of this website, the movement for reform of nonpublication now sponsors an online clearinghouse with an embarrassment of riches on the topic.]

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indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. Id. at 904.

Commentators warn of a harmful potential in nonpublication. They warn that nonpublication makes arbitrary and unlawful dispositions possible because nonpublication makes a case seem less likely to obtain further review and nonpublication diminishes the binding effect of that case on the disposition of future cases. [Exhibit 7, pp. 8-12, nn. 6-9.]

There is every reason why this Court should not feel confident about the unpublished opinions in this case. And that is all the more reason why, when this Appellant seeks rehearing, he must have a due process right to require publication. That right is required to safeguard the rule of law when an appellant objects that the harmful potential of nonpublication has indeed produced an unlawful result in his particular case.

Once that right to publication is invoked in conjunction with a petition for rehearing, the Court will be motivated by an incentive either (1) to stand so firmly in support of its reasoning in the previously unpublished case that the Court will be obliged to apply that same reasoning to other parties who come before the Court in similar cases, or, (2) if that prospect is too repugnant because the reasoning in the unpublished case is truly flawed as the appellant argues, then the Court will have incentive to correct the flaws and change the result accordingly.

It might be argued that an appellant whose appeal is denied by an unpublished opinion should be satisfied to petition for rehearing without publication, and without the fear that his case is being swept under the rug. After all, is not a petition for rehearing enough to counter the sweep-it-under-the-rug effect?

Apparently not, as this case illustrates.

In this case, the Appellant's First Petition alerted

the Court to the Constitutional infirmities of the January 7 unpublished opinion. [Exhibit 5, pp. 1, 5-11, 13-15, Exhibit 6.]

The March 8 unpublished opinion did nothing to fix those infirmities. The March 8 unpublished opinion only amended the January 7 denial about the existence of statutory words.

The Honorable Richard S. Arnold, Senior Judge of the U.S. Court of Appeals for the Eighth Circuit, offers a candid insight in his essay, Why Judges Don't Like Petitions for Re-hearing:

> Why don't judges like petitions for rehearing? The answer should be obvious: People don't like to be told that they are wrong.

Id., 3(1) J. Appellate Practice & Process 28 (Spring 2001).

According to Judge Arnold, judges are only human, after all. If this insight is to be credited, then it would be well to consider both the frailty of human nature, and the difficulty of obtaining review of an unpublished opinion [Exhibit 7, pp. 10-12]. In light of that frailty and that difficulty, it would seem all the more important that there be a system of "checks and balances," a concept not unknown to American Constitutional jurisprudence. The party most immediately concerned--the appellant--should have the option of applying a check to the possible abuses of nonpublication. Publication upon the appellant's request would seem like a modest and minimal check, doing no harm if the appellant's fears are misguided. If the inclusion of a few extra pages in a Federal Reporter can help to safeguard the integrity of the appellate process and sustain public confidence in that process against the suspicion of possible abuse, then the minimal

cost is well worth it.

The Supreme Court has warned that popular skepticism could harm the legitimacy of the judicial process and that the answer must be judicial accommodation--even recusal--to avoid that harm:

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. [Continuing in note "12":] As we held in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), this concern has constitutional dimensions. In that case we wrote:
>
> > . . . The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."" Id., at 825, 106 S.Ct. at 1587 (citations omitted).
>
> Liljeberg, 486 U.S. at 865 & n.12.

Therefore, due process could require recusal if anything less "is unlikely significantly to quell the concerns of the skeptic." Id., 486 U.S. at 865 n.12.

If recusal can be a preventive measure, then surely publication is a far less burdensome preventive measure aimed at the same goal of sustaining public confidence.

The alternative--the appearance of a resolve by the Courts of Appeals to hide mistakes or abuses behind nonpublication, regardless of protests from appellants--promotes the popular perception published in Forbes Magazine:

> [A]n unpublished decision . . . means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings. . . . "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit . . . "They can't justify what they're going to do, so they don't publish it," says [Russell] Lukas [Esq.], who works out of Washington, D.C.
>
> B. McMenamin, Justice in the Dark: Federal Appeals Judges Say They Are So Overworked that They Have To Dispense Quickie Jurisprudence--Meaning, No Accountability in Forbes Magazine, October 30, 2000. [Also available at www.nonpublication.com under "Press Clippings".]

In his First Publication Motion, this Appellant argued:

> Justice Brandeis observed: "Sunlight is said to be the best of disinfectants." The drafter of an opinion must anticipate that neither he nor his colleagues can prevent a departure from stare decisis–or indeed, from Constitutional constraints –from becoming a public, precedential embarrassment. The "embarrassment potential" of a litigant's ability to demand publication is necessary both to deter abuse or mistake before abuse or mistake occurs, and to contribute an incentive for the correction of abuse or mistake that has already occurred.
>
> Due process requires that justice have the appearance of justice. Practices which depart from the rule of law offend due process. If a safeguard is necessary to guarantee the rule of law, then that safeguard follows from due process. A

party's right to require publication of an unpublished opinion to expose judicial error is just such a safeguard, given the appearance that otherwise, the impropriety of secret law and special treatment will be perpetuated. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

Appearances matter. Without a due process right to require publication, the likelihood of effective review appears minuscule, and it seems that the rule of law could continue to be circumvented, and due process would continue to be compromised. That is exactly the wrong appearance to sustain public trust and confidence. That same unfortunate appearance would follow from denial of the right to publication sought by this Motion. The public's continued trust in the Courts of Appeal requires this safeguard.

The worst possibility is that unpublished opinions drafted with errors were drafted that way deliberately, for improper motives. There is certainly no proof of this. But the appearance of a deliberate departure from the rule of law would be intensified if it seemed that a continued effort was made to sweep the problem under the judicial rug.

[Exhibit 7, pp. 14-15 (footnotes omitted).]

This Court did not grant that First Publication Motion. Was denial of that motion "deliberate," or "by default"? The First Publication Motion sought decision of this important issue by this Court en banc. But the en banc procedure requires a judge to ask his colleagues to vote. If no judge asks for a vote, the petition or motion

expires through judicial inaction. Such inaction, perhaps, may signal a lack of judicial interest, but it may seem less like a deliberate choice. This Appellant wants this Court to have every opportunity to make a choice that will appear to the public to be a positive act, not merely passive inertia. Therefore, the present Motion, though it presents matter ancillary to a petition for rehearing en banc, asks for decision by the per curiam panel, or by one judge, however this Court prefers. Indeed, it would be ideal if a judge of this Court would sign his or her name to the order or opinion that decides this Motion. Otherwise, the public--especially those already interested in the problem of nonpublication--might think that the impulse to "hide behind" a judicial order signed--as it were--anonymously, by proxy, by the Clerk, does this Court no credit.

Appearances count. And the First Publication Motion pointed in particular to the appearance of the January 7 unpublished opinion's magic-disappearing-act with statutory words. That magic-disappearing-act certainly did not appear legitimate. And by amending that magic-disappearing-act through the March 8 unpublished opinion, this Court admitted that the January 7 opinion was unlawful. But the appearance of unlawfulness persists. Quite apart from any magic-disappearing-act with statutory words, the appearance of Constitutional infirmity is also very much at issue.

The public could think: If a court is capable of making statutory words disappear as if by magic, there is no telling what else it might be capable of doing. Such a court might even be capable of making precedents disappear as if by magic.

In fact, that is precisely what the unpublished opinions did. The January 7 opinion did this, and the March 8 opinion made no effort to correct it. More

disturbingly, the precedents that disappeared were controlling precedents, not simply the precedents of this Court which should have been controlling through stare decisis, but also the precedents of the Supreme Court, which are supposed to be the final word.

Supreme Court holdings are controlling:

> When this [Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law ... as to all events, regardless of whether such events predate or postdate our announcement of the rule.
>
> Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 97 (1993).

There can be no doubt that an opinion of this Court which performs a magic-disappearing-act with controlling precedent of the Supreme Court is unlawful and unconstitutional.

The unpublished opinions in this case cannot be reconciled with the controlling law of the Supreme Court. The unpublished opinions cannot survive scrutiny. They cannot survive unless there is no scrutiny, unless everything is swept under the rug.

This Appellant has argued the unconstitutionality of the January 7 opinion [Exhibit 5, pp. 1, 5-11, 13-15, Exhibit 6]. Those arguments still apply, because the March 8 unpublished opinion did not address these constitutional issues [Exhibit 3].

Mr. Lewin's claims were not welcome in the trial court, and the trial court imposed attorneys' fees under Fed R. Civ. P. 54. This Court reasoned to uphold that award of fees, but those reasons are confounded by the contrary law of the Supreme Court.

The unpublished opinions in this case concede that:

> A prevailing defendant may recover attorneys' fees in [section] 1983 and [section] 1985 actions only when the plaintiff's claims were "frivolous, unreasonable, or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
>
> [Exhibit 2, p. 13, Exhibit 3, p. 13.]

But for this case, this Court gives an impossibly indiscriminate, catch-all meaning to "frivolous, unreasonable, or without foundation." Under this Court's catch-all reinterpretation, no claim, no matter how well-supported, would ever be safe from being dismissed and fined.

Regarding "whether nominal damages are also available in [section] 1983 actions asserting statutory rights", the unpublished opinions in this case show that the Circuits are split on that topic, and that in this Court the question is one of first impression. [Exhibit 2, p. 8, Exhibit 3, p. 8.]

According to this Court: (1) the case was one of first impression within this circuit, and (2) the other circuits were split. Such a context for any claim used to be (and still is, in published cases) conclusive to show that the claim is not "frivolous, unreasonable, or without foundation."[3] When there is no contrary authority in this

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[3] Even in the unusual case--unlike this one--where a plaintiff-appellant cited no case law to support his argument on appeal, he was protected from sanctions because it was quite sufficient that his case was of first impression. Freeman v. Local Union No. 135, 746 F.2d 1316 (7th Cir. 1984) ("There is no basis for the union's request that this court impose attorney's fees and costs ... As we stated at the outset, this case presents an issue not decided previously in this circuit

Circuit, a claim with support in another circuit is not "frivolous, unreasonable, or without foundation" by definition. But not in this case. In this case, apparently because this case is unpublished, terms are allowed to mean their opposites. "Without foundation" means "with foundation"; and "with foundation" means "without foundation".

Is this Alice in Wonderland "logic" (or illogic)? Alice has journeyed through the looking glass, and she has found herself in an unpublished opinion.

The result is a direct contradiction of Christianburg Garment Co., and more generally, of the "American rule" regarding attorneys' fees.[4]

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[a]lthough it is true that plaintiff cited no cases ..." Id. at 1322 n.13).

For other examples of appeals which were not sanctionable because they were taken in cases of first impression, see Estiverne v. Sak's Fifth Avenue, 9 F.3d 1171 (5th Cir. 1993) ("Sanctions are inappropriate if the issue is one of first impression." Id. at 1174); Ehm v. Amtrack Board of Directors, 780 F.2d 516 (5th Cir. 1986) ("We reject the [sanction] demand as inappropriate in the present case [which] involves a novel procedural issue on which there has been no prior Fifth Circuit decision." Id. at 518.); Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986) (denying sanctions where "the substantive questions raised here" were "not entirely settled." Id. at 753), cert. den. 476 U.S. 1141 (1986).

[4] "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975) (emphasis added, the Supreme Court identifying this as the "American Rule." Id.) The mere fact that a party is unsuccessful on its claims does not warrant a finding of bad faith. Runyon v. McCrary, 427 U.S. 160, 183-84, 96 S.Ct. 2586, 2601, 49 L.Ed.2d 415 (1976). "[O]ne should not be penalized for merely defending or prosecuting a lawsuit." F.D. Rich Co. v. United States ex rel Industrial Lumber Co., 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)).

At this juncture, it seems good to reconsider the question posed in one of the popular news reports. How well would the following observation, quoted above, apply to this case?

> Many judges now feel that they handle unpublished cases in such a hasty, slapdash manner that they don't feel sufficiently confident in their own reasoning to want those cases to serve as precedent.

Does this Court feel confident about striking down the "American Rule" regarding attorneys' fees and

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The "standards for bad faith are necessarily stringent," Lipsig v. National Student Marketing Corp., 663 F.2d 178, 180 (D.C. Cir 1980) (quoting Adams v. Carlson, 521 F.2d 168, 170 (7th Cir. 1975)), "for '[o]therwise those with colorable, albeit novel, legal claims would be deterred from testing those claims in a federal court.'" Sterling Energy, Ltd. v. Friendly Nat. Bank, 744 F.2d 1433, 1435 (1984) (quoting Browning Debenture Holders' Committee v. DASA Corp.,560 F.2d 1078, 1088 (2d Cir. 1977)).

> The mere fact the plaintiff did not prevail before the district court does not necessarily imply that its conduct was "vexatious" or "wanton." The reviewing court must resist the temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, the action must have been wholly unreasonable and without proper foundation. In other words, even where the law or facts appear questionable at the outset, a party may have a perfectly legitimate ground for bringing the suit. See generally Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22, 98 S.Ct. 694, 700, 54 L.Ed.3d 648 (1978). Further, bad faith requires more than a mere showing of a weak or legally inadequate case, and the exception is not invoked by findings of negligence, frivolity or improvidence. United States v. 2116 Boxes of Boned Beef, 726 F.2d 1481, 1488 (10th Cir. 1984). Hence, it is not surprising that attorneys' fees are awarded only when there is "clear evidence" that challenged actions are taken entirely without color ...
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> Autorama Corp. v. Stewart, 802 F.2d 1284, 1288 (10th Cir. 1986).

standing Christianburg Garment Co. on its head?

But, by all means, before trying to answer that question, it is good to consider the "big picture." So here is a brief review of some of the other constitutional frailties which the March 8 opinion neglected to correct.

Here is another of the questions that seems well-suited for a Petition for Writ of Certiorari:

> Whether in light of the Supreme Court's doctrine that a fundamental right of due process is the opportunity to be heard, Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and in light of the Supreme Court's doctrine that qualified immunity is an affirmative defense that must be raised by the party who is to benefit from it, Seigert v. Gilley, 500 U.S. 226, 231 (1991), the Fourth Circuit erred by applying qualified immunity sua sponte on behalf of the Defendants who did not raise that affirmative defense in the trial court or on appeal, and whether the Fourth Circuit's unpredictable reversal of its own prior holding against such a sua sponte application of qualified immunity in Suarez Corp. Industries v. McGraw, 125 F.3d 222, 226 (4th Cir. 1997) deprived Mr. Lewin of his due process opportunity to be heard to argue against qualified immunity.
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> [See Exhibit 5, pp. 7-8; Exhibit 7, p. 4.]

Even worse than the unpredictable reversal of this Court's holding in Suarez Corp. Industries is the appearance that the reversal was performed in a manner intended to escape scrutiny, to be a secret exception to Suarez Corp. Industries for just this one time, for the purpose of upholding sanctions against Mr. Lewin. Such a sleight of hand, a secret and selective exception to legitimate expectations founded on stare decisis, truly

looks like an imposition of ex post facto liability. It also looks like "selective prospectivity" which the Supreme Court holds unconstitutional. First in criminal law, and then in civil law, the Supreme Court has held that "selective application of new rules violates the principle of treating similarly situated defendants the same." Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (criminal law); "[L]itigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally.... 'We depart from this basic judicial tradition when we simply pick and choose from among similarly situated [litigants] those who alone will receive the benefit of a "new" rule...'" James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537-38 (1991) (civil law) (citations omitted). See also Justice Blackmun's concurrence in that case: "The doctrine of stare decisis profoundly serves important purposes in our legal system. Nearly half a century ago, Justice Roberts cautioned: 'Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.'" Id. at 548 (citation omitted).

Ex post facto liability shocks the conscience of courts and of the public at large because it is arbitrary and violates the rule of law. The explicit Ex Post Facto Clause of the Constitution only applies to legislatures. Therefore the Supreme Court interprets the Due Process Clause to prohibit courts from imposing ex post facto liability. Marks v. United States, 430 U.S. 188, 191 (1977); see Bouie v. City of Columbia, 378 U.S. 347, 352-55 (1964); Prater v. U.S. Parole Com'n, 802 F.2d 948, 952 (7th Cir. 1986).

And indeed, this Appellant's First Petition and its two Supplemental Pages [Exhibit 5 pp. 4-5, and generally; Exhibit 6] argue that the errors in the Per Curiam

Opinion entail impositions of ex post facto liability, prohibited by due process.

The Due Process Clause does not explicitly prohibit ex post facto liability. It does not expressly prohibit it, but it prohibits it just the same. Due process, where necessary, provides the safeguards that establish and guarantee the rule of law. It does not matter whether the deviation from the rule of law is more properly described as ex post facto liability or "selective prospectivity" or "unjustifiable discrimination" as long as it "violates basic norms of constitutional adjudication." Griffith, 479 U.S. at 322. Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (citations omitted). "One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government." United States Dept. of Agriculture v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring). Denial of publication would only enable and reinforce that very same violation of basic norms in this case that is prohibited by due process. Therefore, in this case, just as ex post facto liability or other violations of basic norms is prohibited by due process, the denial of an appellant's request for publication, a denial that would make such violation possible, must be encompassed by and prohibited by due process also.

"[T]here is potential for jurisprudential scandal in a court which decides one way one day and another way the next." People v. Hobson, 39 N.Y.2d 479, 488, 348 N.E.2d 894, 901, 384 N.Y.S.2d 419, 425 (1976). And even

if this Court decides one way one day, and another way the next, this Court should not uphold sanctions against a plaintiff who conformed his conduct to what was this Court's then-current position until this Court changed its mind. Mr. Lewin conformed his conduct to what was this Court's then-current position (until this Court changed its mind) in other ways also. Thus, another question that seems well-suited for a Petition for Writ of Certiorari would be:

> Whether the Fourth Circuit erred by deeming Mr. Lewin frivolous for his argument that when new claims arise during the pendency of an action, a plaintiff is not barred from making those new claims the subject of a separate filing, especially in light of prior dicta from the Fourth Circuit supporting his position, Young-Henderson v. Spartanburg Area Ment. Hlth. Ctr., 945 F.2d 770, 774 n.3 (4th Cir. 1991), and support from three other Circuits, cited by Mr. Lewin in the trial court and on appeal. Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1357 (11th Cir. 1998); Computer Associates Intern., Inc. v. Altai, Inc., 126 F.3d 365, 370 (2d Cir. 1997); Cabrera v. City of Huntington Park, 159 F.3d 374, 382 n.12 (9th Cir. 1998).
>
> [Exhibit 6, pp. 1-2; Exhibit 7, pp. 4-6.]

The contrast between this Court first approving a doctrine and then punishing an appellant for following it would also be easy for the public to understand, as another example of ex post facto liability, or as a violation of basic norms, contrary to due process. To be sure, mistakes happen. And maybe, as critics say, the ability of a court to choose nonpublication encourages mistakes. But once an appellant has identified those mistakes, and presented them to the appellate court, and

asked for correction and/or, at the very least, publication, then continuing resistance either to correct or to publish should be of concern to everyone. And when the court has admitted to having made mistakes, as this Court did by replacing the January 7 unpublished opinion with a March 8 unpublished opinion, the need for closer scrutiny is self evident.

This Court leads the circuits in the use of nonpublication.[5] But across the country, pressure is building. If the practice of nonpublication appears so inflexible and so inherently subject to abuses that no compromise seems possible, then sooner or later the practice will be outlawed in its entirety. That is the import of Anastasoff and its progeny.[6]

In Anastasoff, the Eighth Circuit decided that the Constitution prohibited nonpublication of opinions because, "insofar as [nonpublication] would allow us to avoid the precedential effect of our prior decisions, [it] purports to expand the judicial power beyond the bounds of Article III ..." Id., 223 F.3d at 900. In its extended analysis, Anastasoff quoted, among others, William Cranch, the first publisher of Supreme Court opinions:

> In a government which is emphatically styled a government of laws, the least possible range ought

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[5] And in that leading role, 91.5% of this Court's opinions were unpublished in 2001, according to Judicial Business of the United States Courts: 2001 Annual Report of the Director, 40, tbl. S-3 (available at www.uscourts.gov/judbus2001/contents.html).

[6] See, e.g.: Community Visual Commun. v. City of San Antonio, 148 F. Supp. 2d 764, 774-75 (W.D. Tex. 2000); Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, Jones, & DeMoss, JJ., dissenting: "The law is supposed to inform the choices of potential litigants. How can this circuit's decisions do so, if they carry no predictive effect?" Id.)

> to be left for the discretion of the judge ... perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. Id., 223 F.3d at 902 n.12 (quoting 1 Cranch iii (1804)).

Anastasoff also quotes from Justice Story's Commentaries on the Constitution of the United States, Sections 377-78 (1833), in part as follows:

> A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles. ... [T]his conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. ...[a] departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.
>
> Id., 223 F.3d at 904.

The instant case is "a case in point" of how nonpublication seems to have promoted the disregard of precedent, including disregard of those precedents that must be controlling. Anastasoff concludes that "judicial power ... is based on reason, not fiat." Id. Unfortunately, the January 7 and March 8 unpublished opinions are based on unconstitutional fiat. Since it appears that nonpublication caused this problem, the compromise this Appellant proposes is not to eliminate all nonpublication, but to let publication at an appellant's request exert

whatever corrective influence publication can. This Court, which makes use of nonpublication more than any other, should welcome that compromise, since the flexibility of a compromise might forestall the final reckoning foretold by Anastasoff and its progeny.

III. CONCLUSION

The choice is stark: to publish or not to publish–and if not to publish, then to deny that a party has a due process right to require publication. The departure from the rule of law in this case is already self-evident. And the problem of unpublished opinions will not go away. Perhaps the test cases which are best remembered are those (1) that contain fact patterns the public can easily understand, and (2) that decide procedures the public can easily understand.

This case involves a fact pattern--e.g., the magically disappearing statutory words that vanished from the January 7 unpublished opinion, and the magically disappearing controlling precedents that vanished from both the January 7 and March 8 opinions--and a procedure--i.e., whether courts may resist the exposure of unjust secret law. The public could easily understand both issues. For good or ill--though one hopes the result will lead to the greater good--the choice this Court makes in regard to this Motion might ultimately contribute to another milestone in legal history.

Respectfully submitted,
RICHARD J. CONROD, SR., P.C.

By: Richard J. Conrod, Sr.
Virginia State Bar No. 35967
Suite 201
522 S. Independence Boulevard
Virginia Beach, Virginia 23452

Telephone: : (757) 456-0883
Facsimile: : (757) 456-2336

CERTIFICATE OF SERVICE

I, RICHARD J. CONROD, SR., ESQUIRE, certify that on April 5, 2002, I caused a true and correct copy of this Appellant's Amended Due Process Motion for Publication, Ancillary to His Petition for Rehearing En Banc, to be sent by regular United States mail, postage prepaid, to the offices of the following counsel:

David Kegebein Sutelan, Esq.
MAYS & VALENTINE, L.L.P.
2525 Dominion Tower
999 Waterside Drive
Norfolk, Virginia 23510

Jonathan B. Sprague, Esq.
POST & SCHELL, P.C.
1800 John F. Kennedy Boulevard
19th Floor
Philadelphia, Pennsylvania 19103

Richard J. Conrod, Sr.
Attorney

DATED: April 5, 2002